

KANSAS SENTENCING GUIDELINES



**DESK REFERENCE MANUAL
2011**

KANSAS SENTENCING COMMISSION

STAFF

SCOTT SCHULTZ
EXECUTIVE DIRECTOR

KUNLUN CHANG
DIRECTOR OF RESEARCH

BRENDA HARMON
*SPECIAL ASSISTANT TO THE
EXECUTIVE DIRECTOR*

JAN BRASHER
FISCAL DIRECTOR

FENGFANG LU
SENIOR RESEARCH ANALYST

CARRIE KRUSOR
RESEARCH DATA ENTRY

JENNIFER DALTON
ACCOUNTANT

TRISH BECK
PROGRAM ASSISTANT

CHRIS CHAVEZ
RESEARCH ANALYST

MICHELE VELDE
OFFICE ASSISTANT

KANSAS SENTENCING COMMISSION

JAYHAWK TOWER
700 SW JACKSON STREET, SUITE 501
TOPEKA, KS 66603-3757

(785) 296-0923
FAX (785) 296-0927
www.kansas.gov/ksc

KANSAS SENTENCING COMMISSION

2011 Membership

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Honorable Ernest L. Johnson, Judge, 29th Judicial District, Div. 13

VICE CHAIR

Honorable Richard M. Smith, Chief Judge, 6th Judicial District, Div. 2

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Chris A. Mechler, Court Services Specialist, Office of Judicial Administration

ATTORNEY GENERAL

Amy J. Hanley, Attorney General's Office

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Thomas J. Drees, County Attorney

Annie E. Grevas, Director, 28th Judicial District Community Corrections

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Raymond Roberts, Secretary of Corrections

KANSAS PRISONER REVIEW BOARD CHAIRPERSON OR DESIGNEE

David W. Riggan, Kansas Prisoner Review Board Designee

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APPOINTMENTS BY THE SPEAKER OF THE HOUSE AND THE MINORITY LEADER

Representative Patricia N. Colloton, House of Representatives District 28

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Table of Contents

TABLE OF CONTENTS	3
2011 DESK REFERENCE MANUAL	7
INTRODUCTION	7
TIME LINE OF KSGA SELECTED EVENTS	8
ADDITIONAL COPIES	9
2011 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW	10
House Substitute Senate Bill 6 - DUI and Domestic Violence Diversions	10
House Substitute for Senate Bill 23 - Juvenile Offenders	14
House Substitute for Senate Bill 36 - Abortion	14
House Substitute for Senate Bill 37 - Kansas Offender Registration Act	15
House Substitute for Senate Bill 55 - Reconciliation Bill	18
Senate Bill 97 - Court Fees and Costs	20
Senate Bill 112 - County Surveyors	20
Senate Bill 227 - Anemometer Towers.....	20
Senate Bill 247 - Reconciliation Bill	21
House Bill 2010 – Civil Forfeiture	21
House Bill 2023 – Controlled Substances	21
House Bill 2035 – Child Abuse	22
House Bill 2044 – Requirements after Motor Vehicle Accident.....	22
Senate Substitute for House Bill 2049 – Controlled Substances	23
House Bill 2067 – Elections	23
Senate Substitute for House Bill 2134 – Workers’ Compensation.....	24
Senate Substitute for House Bill 2135 – Employees	24
House Bill 2151 – Breach of Privacy and Blackmail	25
House Bill 2218 - Abortion	26
House Bill 2240 – Cemetery Corporations.....	26
House Bill 2312 – Regulated Scrap Metal.....	26
House Bill 2339 – Reconciliation Bill	27
CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES	29
SENTENCING CONSIDERATIONS	29
SENTENCING GUIDELINES AND GRIDS	29
OFF-GRID CRIMES	29
DRUG GRID AND NONDRUG GRID.....	31
GRID BLOCKS	31
CHAPTER II: PROCEDURE PRIOR TO SENTENCING	33
DETERMINATION OF THE DATE OF OFFENSE; APPLICATION TO THE SENTENCING GUIDELINES	33
CHARGING DOCUMENTS	33
FINGERPRINTING; SENTENCING GUIDELINES IMPLICATIONS	33
Municipal Court Duties	33
Law Enforcement Duties	33
County/District Court Duties	34
Juvenile	34
OFFICIAL RECORDS.....	34
PLEA AGREEMENT RULES	35
DIVERSIONS	35

DEFERRING SENTENCE PENDING MENTAL EXAMINATION	36
DRUG ABUSE ASSESSMENT	36
CHAPTER III: CRIME SEVERITY LEVELS	37
GENERAL RULES FOR DETERMINING SEVERITY LEVELS	37
ANTICIPATORY CRIMES	38
Attempt K.S.A. 2011 Supp. 21-5301, [formerly K.S.A. 2010 Supp. 21-3301]	38
Conspiracy K.S.A. 2011 Supp. 21-5302, [formerly K.S.A. 2010 Supp. 21-3302]	39
Solicitation K.S.A. 2011 Supp. 21-5303, [formerly K.S.A. 2010 Supp. 21-3303]	39
CHAPTER IV: CRIMINAL HISTORY	41
CRIMINAL HISTORY RULES	41
Juvenile Adjudications	43
Diversions	43
Information Not Relevant to Criminal History	44
Special Applications in Determining Criminal History K.S.A. 2011 Supp. 21-6811 [formerly K.S.A. 21-4711]	44
Person Misdemeanors	44
Select Class B Nonperson Misdemeanors	44
Involuntary Manslaughter and DUI	45
Burglary	45
Out-of-State Convictions	45
Juvenile Records	46
Anticipatory Crimes	46
Drug Crimes	46
Leaving the Scene	47
PROOF OF CRIMINAL HISTORY	47
CHAPTER V: PRESENTENCE INVESTIGATION REPORTS	48
REQUIREMENTS	48
CHAPTER VI: SENTENCING	51
SENTENCING RANGE	51
SENTENCING OPTIONS	51
Authorized Dispositions K.S.A. 2011 Supp. 21-6604 [formerly K.S.A. 2010 Supp. 21-4603d]	51
Fines	53
Presumptive Nonprison	53
Duration of Probation (Court Services or Community Corrections)	53
Conditions of Probation	54
Target Population for Community Corrections (2000 Senate Bill 323)	54
Target Population for Treatment (2003 Senate Bill 123)	55
Presumptive Imprisonment	56
Good Time	56
Border Boxes	57
Aggravated Habitual Sex Offender	57
SPECIAL SENTENCING RULES	58
Public Safety Offenses / Firearms Finding:	58
Habitual or Repeat Offenses:	60
Nongrid Offenses:	64
Finance Offenses:	64
SPECIAL SENTENCING CONSIDERATIONS	65
Correctional Conservation Camps	65

MULTIPLE CONVICTIONS; SENTENCES ON SAME DATE.....	66
Limitations on Concurrent and Consecutive Sentences for Multiple Convictions.....	66
Determining the Base Sentence and Primary Crime.....	68
DEPARTURES AND DEPARTURE FACTORS	68
Mitigating Factors - K.S.A. 2011 Supp. 21-6815(c)(1)(A) – (E) and (e).....	70
Aggravating Factors - K.S.A. 2011 Supp. 21-6815(c)(2)(A) – (H).....	70
Additional Aggravating Factors for Drug Grid - K.S.A. 2011 Supp. 21-6816(a)(1) – (4).....	71
SEX OFFENDERS POSTRELEASE SUPERVISION DEPARTURE.....	72
DURATIONAL AND DISPOSITIONAL DEPARTURES.....	72
JURY TRIAL PROCEDURES WHEN STATE SEEKS AN UPWARD DURATIONAL DEPARTURE	73
DEPARTURE AND CONSECUTIVE SENTENCING COMBINATION	73
REPORTING DISPOSITIONS TO THE KANSAS BUREAU OF INVESTIGATION AND THE KANSAS SENTENCING COMMISSION.....	74
CHAPTER VII: APPEALS	76
APPELLATE REVIEW PRINCIPLES – K.S.A. 2011 SUPP. 21-6820 [FORMERLY K.S.A. 21-4721]	76
CHAPTER VIII: COMMUNITY SANCTIONS AND POSTRELEASE SUPERVISION	77
POSTRELEASE SUPERVISION.....	77
VIOLATIONS OF CONDITIONS OF RELEASE - PROBATION OR POSTRELEASE SUPERVISION.....	78
Probation	78
Postrelease Supervision	79
Conversion of Sentence for a Crime Committed After July 1, 1993, But Before March 24, 1994.....	79
Conversion of Sentence for a Crime Committed After March 24, 1994.....	79
CHAPTER IX: RETROACTIVITY	81
RETROACTIVE APPLICATION OF SENTENCING GUIDELINES.....	81
2000 RETROACTIVITY PROVISIONS	82
CHAPTER X: POINTS OF INTEREST ABOUT THE GUIDELINES	83
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT	83
SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA	87
LISTING OF SPECIAL SENTENCING RULES	92
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION	95
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE	99
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR FIELD SERVICES OFFICERS	102
SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS.....	103
Time Line of Selected Events Related to the KSGAavailable on website	www.kansas.gov/ksc
Selected Kansas Case Law Decisions on Topics Related To the KSGA and Sentencing Issues since 1993	available on website
	www.kansas.gov/ksc
Selected Attorney General Opinions on Topics Related To the KSGA and Sentencing Issues since 1993.	available on website
	www.kansas.gov/ksc
Approved and Disapproved Non-Statutory Departure Reasons Cited by Sentencing Courts Chart	available on website.....
	www.kansas.gov/ksc
Appendix A: KSGA Instructions and Forms	A 1
Instructions for the Presentence Investigation Report (PSI).....	A 1
Instructions for the Criminal History Worksheet.....	A 9
(PSI & Criminal History Worksheet Forms follow)	

Instructions for the Journal Entry of Judgment Forms	A27
(Journal Entry of Judgment Form follows)	
Instructions for the Journal Entry of Probation Revocation Hearing Form	A57
(Journal Entry of Probation Revocation Hearing Form follows)	
Appendix B: Felony Crimes	B1
Alphabetically by Statute Description.....	B1
Numerically by Statute Number	available on website: www.kansas.gov/ksc
Severity Level and then by Statute Number....	available on website:... www.kansas.gov/ksc
Appendix C: Misdemeanor Crimes	C1
Alphabetically by Statute Description.....	C1
Numerically by Statute Number	available on website: www.kansas.gov/ksc
Class and then by Statute Number.....	available on website:... www.kansas.gov/ksc
Appendix D: Sentencing Grids	D1
Sentencing Range – Drug Offenses.....	D1
Sentencing Range – Nondrug Offenses.....	D2

2011 DESK REFERENCE MANUAL

INTRODUCTION

The Kansas Sentencing Commission Desk Reference Manual (“Manual”) provides general instructions for application of the provisions of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2011 Supp. 21-6801 *et seq.*, [formerly K.S.A. 21-4701 *et seq.*]. The Manual contains features that we hope will not only inform users of the latest developments in sentencing law 2011 but also help to facilitate more efficient understanding and application of the law. In 2010 the Legislature recodified the criminal code, effective July 1, 2011. In the 2011 Session the Legislature tweaked the code, and also enacted several other significant statutory changes affecting the practice of criminal law in general and, specifically, affecting sentencing law and procedure. We highlight the following:

1) The Kansas Criminal Code was recodified.

2010 House Bill 2668 was passed by the 2010 Legislature and became effective July 1, 2011. HB 2668 recodified the Kansas Criminal Code by restructuring, combining and renumbering criminal statutes into a consistent and organized format. The Kansas Criminal Code has been moved from K.S.A. 21-3101 *et seq.* to K.S.A. 21-5101 *et seq.* The new criminal statute numbers will be official on publication of the 2011 Supplement to the Kansas Statutes Annotated.

Statutory citations within this Manual cite to the new, recodified statute number, but also include the former statute number for the user’s reference. The Kansas Sentencing Commission’s website also offers a cross-reference document between the new and former statute numbers. The felony and misdemeanor crime listings in Appendix B and Appendix C of this Manual refer only to the new statute numbers.

2) The New DUI Bill - House Substitute for Senate Bill 6 – was enacted.

House Substitute for Senate Bill 6 contains substantial modifications to nearly all aspects of DUI criminal law and sentencing, and DUI-related administrative driver’s license procedures and sanctions. While DUI crimes remain non-grid offenses, and, thus, not actually subject to the KSGA, convictions and sentencings for those DUIs that are felony offenses must be memorialized in a journal entry approved by KSC. The KSC approved modifications to the 2011 PSI form and 2011 Journal Entry of Judgment form to accommodate these changes.

3) The Kansas Offender Registration Act (KORA) was substantially amended.

House Substitute for Senate Bill 37 amended KORA to bring it into substantial compliance with the Federal Adam Walsh Act. The Offender Registration Supplement to the Journal Entry of Judgment form reorganizes offenders into three general categories: sex offenders, violent offenders and drug offenders. Depending on the crime of conviction, offenders subject to registration must now register for either 15 years, 25 years or for the offender’s lifetime. Please see the 2011 Legislative Changes section of the Manual for more information about H Sub SB 37.

4) PSI and Journal Entry forms now include the “DV Case” designation.

2010 House Bill 2517 created a “domestic violence tag” that may be used for all criminal cases if the trier of fact determines that the defendant committed a domestic violence offense based on the underlying facts of the case. For example, an offender committing a burglary might be motivated by a desire to punish, intimidate or take revenge on a family member, making the offense one of domestic violence. The 2011 PSI form includes a checkbox next to the case number to indicate whether the trier of fact made a special finding that the case is a domestic violence case and the judge designated the case as a domestic violence case. Likewise, the 2011 Journal Entry of Judgment form includes a “DV Case” checkbox in Section III, and includes special finding checkboxes on page 2 to record the findings that must be made on the record before tagging the case as a domestic violence case. Please see K.S.A. 2011 Supp. 22-4616 and 22-4617 for more information.

5) The Kansas Prisoner Review Board has replaced the Kansas Parole Board.

Executive Reorganization Order #34 (ERO 34) became effective July 1, 2011. ERO 34 dissolved the Kansas Parole Board and instead created the Prisoner Review Board within the Department of Corrections. The Prisoner Review Board assumes all powers and duties of the Parole Board. Within this Manual, all previous references to the Parole Board have been adjusted accordingly.

TIME LINE OF KSGA SELECTED EVENTS

In order to reduce the size of the Manual, the Time Line of KSGA Selected Events is posted, along with other Appendices, on the Kansas Sentencing Commission (KSC) website at www.kansas.gov/ksc. All of the 2011 legislative changes relative to the sentencing guidelines remain in the Manual and are summarized in the first section. The case law updates have been reformatted and posted on the KSC website under the “Case Law Updates” link. These updates are now organized by topic area and posted with the most recent cases at the top of the page. Finally, the chart outlining non-statutory departure reasons that have been approved or disapproved by the Kansas appellate courts has been updated to reflect the most recent published decisions through July 1, 2011, and has been posted on our website. Posting these documents on our website rather than publishing them in the Manual allows us to easily update the material as new information becomes available.

The statutory listings of felonies and misdemeanors in Appendix B and C have also been modified to reflect the specific statutory violations based upon the 2011 Legislative Changes. Due to the costs of printing, only the alphabetical listing of the felonies and misdemeanor statutes has been included in the printed Manual. The separate numerical, severity level and class listings are now only available for download from the KSC website. The complete versions of both the felony and misdemeanor statute files are posted with the Desk Reference Manual under the “Agency Publications” link.

The Kansas Sentencing Commission encourages criminal justice professionals to contact our staff for further information and assistance regarding related questions concerning the Manual or the Kansas Sentencing Guidelines Act. Questions may be directed to our Staff at (785) 296-0923, or by e-mail at sentencing@sentencing.ks.gov.

Sentencing provisions in effect at the time of the commission of the crime control the sentence for the offense(s) of conviction. Amendments to statutes are not applied retroactively unless the statutory language clearly indicates the intent to apply the changes retroactively.

2011 changes to the penalties and/or statutory language and newly enacted legislation listed within the Legislative Changes to the Kansas Sentencing Guidelines Act and Related Criminal Law are effective on the date listed below the change(s).

ADDITIONAL COPIES

Requests for copies of the Manual may be obtained from the Kansas Sentencing Commission at a cost of twenty dollars each, plus applicable sales tax, for a bound hard copy document and ten dollars each plus tax for a computer disk. This Manual may also be accessed and printed free of charge via the Kansas Sentencing Commission website at www.kansas.gov/ksc.

This Manual is not copyrighted. The entire text of this Manual, along with all of the grids, charts and forms, may be reproduced in part or in its entirety by any party wishing to do so. The Desk Reference Manual should always be used in consultation with the applicable Kansas statutes, the language of which controls.

2011 LEGISLATIVE CHANGES TO THE KANSAS SENTENCING GUIDELINES ACT AND RELATED CRIMINAL LAW

Changes affecting the Kansas Sentencing Guidelines Act, K.S.A. 2011 Supp. 21-6801 *et seq.*, [formerly K.S.A. 21-4701 *et seq.*] and other related criminal statutes were made by the Kansas Legislature during the 2011 Legislative Session. These changes are summarized below under the headings of the bills in which the changes were included. Substantive changes are in italics for easy identification.

House Substitute Senate Bill 6 - DUI and Domestic Violence Diversions

House Substitute for Senate Bill 6 primarily amends various administrative and criminal statutes relating to driving under the influence (DUI). Major provisions of this new legislative approach to DUI follow:

Central Repository

Several provisions of the bill advance the legislative purpose that complete and accurate records regarding DUI offenders be maintained in a central location. The location designated is the KBI's already existing "criminal justice information system central repository," which had been established for the collection, storage, and dissemination of criminal history record information. All courts prosecuting DUIs, state and local, will be required to report to the central repository DUI filing and disposition information for an offender. A prosecutor, prior to obtaining a DUI conviction of an offender, will be required to obtain from the offender's history the central repository, which is to insure that the offense is being prosecuted at the proper level.

DUI Evaluation

Prior to sentencing, all offenders shall be required to participate in an alcohol and drug evaluation conducted by a provider in accordance with the amended provisions of K.S.A. 8-1008 and shall follow any recommendation made by the provider, unless otherwise ordered by the court.

DUI Fines

On and after July 1, 2011, minimum fines for 1st, 2nd, and 3rd DUI offenses increase by \$250, and an amount of \$250 from each fine shall be remitted to the state treasurer for the Community Corrections Supervision Fund.

- The fine for a 1st offense shall be \$750 - \$1000.
- The fine for a 2nd offense shall be \$1250 - \$1750.
- The fine for a 3rd offense shall be \$1750 - \$2500
- The fine for a 4th or subsequent offense shall be \$2500.

1st DUI Conviction

For a first conviction of DUI, the court is allowed to place the offender under house arrest to serve the remainder of the minimum sentence only after the offender has served 48 consecutive hours imprisonment. K.S.A. 8-1567(b)(1)(A).

2nd DUI Conviction

For a second conviction of DUI, offenders may be placed on work release after serving 48 consecutive hours imprisonment. *If so placed, the offender shall serve a minimum of 120 hours of confinement. Such 120 hours shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day.* Offenders may also be placed on house arrest to serve the remainder of the minimum sentence after serving 48 consecutive hours imprisonment. *If so placed, the offender shall be required to serve a minimum of 120 hours of confinement within the boundaries of the residence and shall be electronically monitored. Any exceptions to remaining within the residential boundaries shall not count towards the minimum 120 hours.* K.S.A. 8-1567(b)(1)(B).

3rd DUI Conviction

For a third conviction of DUI, offenders may be placed on work release after serving 48 consecutive hours imprisonment. *If so placed, the offender shall serve a minimum of 240 hours of confinement. Such 240 hours shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day.* Offenders may also be placed on house arrest to serve the remainder of the minimum sentence after serving 48 consecutive hours imprisonment. *If so placed, the offender shall be required to serve a minimum of 240 hours of confinement within the boundaries of the residence and shall be electronically monitored. Any exceptions to remaining within the residential boundaries shall not count towards the minimum 240 hours.*

The classification of a DUI, third conviction, depends on the offender's DUI history. It is an A nonperson misdemeanor if the offender does not have a prior DUI conviction which occurred within the preceding 10 years, not including any period of incarceration. K.S.A. 8-1567(b)(1)(C). It is a nonperson felony if the offender does have a prior DUI conviction which occurred within the preceding 10 years, not including any period of incarceration. K.S.A. 8-1567(b)(1)(D).

4th or Subsequent DUI Conviction

For a fourth or subsequent conviction of DUI, the court may place the offender on work release or under house arrest to serve the remainder of the minimum sentence only after the offender has served 72 consecutive hours of imprisonment. *The confinement requirements are the same as those for a third conviction.* K.S.A. 8-1567(b)(1)(E).

DUI Sentences to Imprisonment

All imprisonments for DUI, regardless of the number of prior convictions, are served in jail. There are no provisions for a remand of an offender to DOC, and there are no provisions for postrelease supervision by DOC parole officers. Offenders who been released from their terms of imprisonment will then be under supervision by either court services officers or community corrections officers.

DUI Community Supervision

Upon expiration of a term of imprisonment for a third, fourth or subsequent DUI conviction, the offender shall serve a mandatory one-year period of supervision. *The court shall determine whether the offender shall be supervised by community correctional services or court services based upon the risks and needs of the offender. During supervision, the offender shall be required to participate in a multidisciplinary model of services for substance use disorders facilitated by SRS, to include assessment and, if appropriate, treatment.* The bill amends the Community Corrections Act to clarify that DUI offenders may be supervised by Community Correctional Service Programs.

DUI Expungement

The bill amends the expungement statute [formerly K.S.A. 21-4619, to be codified at K.S.A. 21-6614] to allow for expungement of a DUI (K.S.A. 2011 Supp. 8-1567 or municipal equivalent) after ten years. Prior to this amendment, expungement for DUI was not allowed.

DUI – Other Provisions

- *Only DUI convictions occurring on or after July 1, 2001*, shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender. K.S.A. 8-1567(j)(3).
- *Legal use of drugs shall not be a defense to DUI of drugs.*
- The blood or breath testing window for DUI has been increased from two hours to *three hours*.
- Existing criminal interlock, impound, and immobilization provisions for second or subsequent convictions are removed from the bill in light of the revised administrative penalties.

Commercial DUI

The Commercial DUI statute, K.S.A. 2010 Supp. 8-2,144, is amended to ensure consistency with DUI under K.S.A. 2011 Supp. 8-1567, as follows:

- The definition of Commercial DUI is expanded to include “attempting to operate” such vehicle.
- The fines for first and second offenses are the same as for DUI under K.S.A. 2011 Supp. 8-1567. However, the fine for third offenses is \$1750 to \$2500. On and after July 1, 2011, an amount of \$250 from each commercial DUI fine shall be remitted to the state treasurer for the Community Corrections Supervision Fund.
- The sentence for any conviction for Commercial DUI when one or more children under 14 years of age are in the vehicle at the time of the offense shall be enhanced by one month imprisonment which shall be served consecutively to any other minimum mandatory penalty. The court may order the enhancement be served on house arrest, work release, or other conditional release.
- In lieu of payment of fine under this section, the court may order the defendant to perform community service. The defendant shall receive credit on the fine imposed in an amount equal to \$5 per hour of community service.
- The court shall be required to electronically report every conviction or diversion agreement for commercial DUI and obtain criminal history information from the KBI before sentencing.
- For the purpose of determining whether a conviction is a first, second, third or subsequent convictions, a conviction includes violation of a law or ordinance of another state or an ordinance of any city, or resolution of any county which prohibits the same acts. Any convictions occurring during a person’s lifetime shall be taken into account when determining the sentence to be imposed for a first, second, third or subsequent offender. (The lifetime look-back is not in the regular DUI statute.)

Restructuring of Alcohol and Drug Evaluations and Treatment

The bill removes provisions in K.S.A. 8-1008 regarding evaluation and supervision of DUI offenders under the Alcohol and Drug Safety Action Program (ADSAP). The bill requires SRS to develop a standardized substance use evaluation.

DUI Test Refusals

The bill amends the administrative penalties for test refusal as follows:

- For a first and subsequent refusal to submit to and complete any test of breath, blood or urine, driving privileges shall be suspended for one year.
- For a first refusal, driving privileges shall be suspended for one year, followed by a one-year ignition interlock restriction.
- For a second test refusal, driving privileges shall be suspended for *one year, followed by a two-year ignition interlock restriction.*
- For a third test refusal, driving privileges shall be suspended for *one year followed by a three-year ignition interlock restriction.*
- For a fourth test refusal, driving privileges shall be suspended for *one year, followed by a four-year ignition interlock restriction.*
- For a fifth or subsequent test refusal, driving privileges shall be suspended for *one year, followed by a 10-year ignition interlock restriction.*

DUI Test Failure

The bill amends the penalties for a test failure or an alcohol or drug-related conviction as follows:

- If the person submits to testing and results show alcohol concentration of .08 or greater, driving privileges shall be suspended for 30 days for the first occurrence *and one year for the second or subsequent occurrence.* If the results show alcohol concentration of .15 or greater, driving privileges shall be suspended for one year *for the first and subsequent occurrence.*
- If the person is less than 21 years of age at the time of the test and the results show alcohol concentration of .08 or greater, driving privileges shall be suspended for one year. The permanent revocation upon a fifth or subsequent occurrence was repealed.
- *Between July 1, 2011, and June 30, 2015, for a first occurrence, driving privileges shall be suspended for 30 days for all offenders, followed by a 180-day ignition interlock restriction, or a one-year ignition interlock restriction for offenders with certain previous violations on their record.* The prior violations that shall trigger the one-year ignition interlock restriction include open container, minor in possession, violations listed in the habitual violator statute, three or more moving violations in a single year or any other suspension or revocation of driving privileges.
- *On and after July 1, 2015, the penalty for a first occurrence shall be a 30-day suspension followed by a restriction to driving only under circumstances provided by subsections (a)(1), (2), (3) and (4) of K.S.A. 8-292 for a period of 90 days to one year (i.e. to and from work or school, in the course of employment, for medical emergency, to and from probation or parole meetings, drug or alcohol counseling, or to alcohol and drug safety action program as required and at other times and to other places specified in the order).*
- For a *second occurrence*, driving privileges shall be suspended for one year, followed by a one-year ignition interlock restriction.
- For a *third occurrence*, driving privileges shall be suspended for one year, followed by a two-year ignition interlock restriction.
- For a *fourth occurrence*, driving privileges shall be suspended for one year, followed by a three-year ignition interlock restriction.
- For a *fifth or subsequent occurrence*, driving privileges shall be suspended for one year, followed by a 10-year ignition interlock restriction.

Tampering with an Ignition Interlock Device

The criminal penalty for tampering with an ignition interlock device remains a class A nonperson misdemeanor. However, administrative penalties for tampering with or requesting another to blow into an ignition interlock device are amended as follows:

- *On a first conviction, the ignition interlock restriction shall be extended for an additional 90 days; and*
- *On a second or subsequent conviction, the original interlock restriction period shall be restarted.*

For any violation involving operation of a vehicle not equipped with an ignition interlock device while such person's driving privileges have been restricted to driving only a motor vehicle equipped with such device, *the original interlock restriction period shall be restarted.*

This bill was approved by the Governor and became effective July 1, 2011.

House Substitute for Senate Bill 23 - Juvenile Offenders

Juvenile Jury Trials

House Substitute for Senate Bill 23 amends K.S.A. 2010 Supp. 38-2357 by establishing a statutory right to jury trial for juvenile offenders and provides a jury trial procedure within the revised Kansas Juvenile Justice Code. The procedural provisions are borrowed from the statutes governing adult jury trials, with some modifications. The principal differences from the adult jury trial provisions are:

- A juvenile shall request a jury trial in every case, within 30 days from the entry of a plea of not guilty. In adult felony cases, trial by jury is automatic unless waived.
- A juvenile shall not have the right to personally participate in *voir dire*. Adult defendants have this right.

This bill was approved by the Governor and became effective July 1, 2011.

House Substitute for Senate Bill 36 - Abortion

Licensing of Abortion Clinics

House Substitute for Senate Bill 36 pertains to abortions and licensure of abortion clinics. The bill provides that it shall be unlawful to operate a facility within Kansas without possessing a valid license issued annually by the secretary. It shall also be unlawful for a person to perform or induce an abortion in a facility unless such person is a physician, with clinical privileges at a hospital located within 30 miles of the facility. *Violation of either provision is a class A nonperson misdemeanor and shall constitute unprofessional conduct under K.S.A. 65-2837.*

The bill was approved by the Governor and became effective July 1, 2011.

House Substitute for Senate Bill 37 - Kansas Offender Registration Act

Offender Classification

House Substitute for Senate Bill 37 amends the Kansas Offender Registration Act (KORA) (K.S.A. 22-4901 *et seq.*) to bring it into substantial compliance with the federal Adam Walsh/Sex Offender Registration and Notification Act. The bill, in amendments to K.S.A. 22-4902, classifies all offenders subject to registration into three groups as follows:

- **“Sex offender”** includes any person who:
 - Is convicted of a sexually violent crime;
 - Is adjudicated as a juvenile offender for an act which if committed by an adult would be considered a sexually violent crime, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim;
 - Has been determined to be a sexually violent predator;
 - Is convicted of any of the following acts when one of the parties is less than 18 years of age: adultery, criminal sodomy, promoting prostitution, patronizing a prostitute, or lewd and lascivious behavior;
 - Is convicted of sexual battery;
 - Is convicted of attempt, conspiracy or criminal solicitation of any of the above offenses;
 - Has been convicted of a substantially similar offense in effect prior to July 1, 2011 or any out-of-state conviction for an offense that would be an offense defined above.
- **“Violent offender”** includes any person who is convicted of any of the following:
 - Capital murder; murder in the first degree; murder in the second degree; voluntary manslaughter; involuntary manslaughter; kidnapping; aggravated kidnapping; criminal restraint, except by a parent and only when the victim is less than 18 years of age; aggravated human trafficking; attempt, conspiracy or criminal solicitation of any of these offenses; a substantially similar offense in effect prior to July 1, 2011; or any out of state conviction for an offense that would be an offense in this section; or,
 - Any person felony and the court make a finding on the record that a deadly weapon was used in the commission of such felony.
- **“Drug offender”** includes any person who is convicted of any of the following:
 - Unlawful manufacture or attempted unlawful manufacture of a controlled substance; possession of methamphetamine precursors; distribution or possession with intent to distribute cocaine, amphetamine, methamphetamine or precursors; a substantially similar offense in effect prior to July 1, 2011; any out of state conviction for an offense that would be an offense in this section or any attempt, conspiracy or criminal solicitation of any of these offenses.

Offender Registration Terms

The bill, in amendments to K.S.A. 22-4906, redefines registration periods into three broad groups as follows:

- Offenses requiring registration for **15 years**:
 - Any of the following when one of the parties involved is less than 18 years of age: sexual battery, adultery, patronizing a prostitute, and lewd and lascivious behavior;
 - Capital murder, murder in the first degree; murder in the second degree; voluntary manslaughter; involuntary manslaughter; criminal restraint, except by a parent and only when the victim is less than 18 years of age; any act which at the time of the sentencing for the offense has been determined beyond a reasonable doubt to have been sexually

motivated, unless the court, on the record, finds that the act involved non-forcible sexual conduct, the victim was at least 14 years of age and the offender was not more than four years older than the victim; a person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such felony; unlawful manufacture or attempted unlawful manufacture of a controlled substance; possession of methamphetamine precursors; distribution or possession with intent to distribute amphetamine, methamphetamine or precursors; or any attempt, conspiracy or criminal solicitation of any of these offenses.

- Offenses requiring registration for **25 years**:
 - Criminal sodomy as defined in subsection (a)(1) or (a)(2) of K.S.A. 21-5504 [formerly subsection (a)(1) of K.S.A. 21-3505] when one of the parties is less than 18 years of age; indecent solicitation of a child as defined in subsection (a) of K.S.A. 21-5508 [formerly K.S.A. 21-3510]; electronic solicitation; aggravated incest as defined in subsection (b) of K.S.A. 21-5604 [formerly K.S.A. 21-3603]; indecent liberties with a child as defined in subsection (a) of 21-5506 [formerly K.S.A. 21-3503]; unlawful sexual relations; sexual exploitation of a child 14 or more years of age but less than 18 years of age; aggravated sexual battery as defined in subsection (b) of K.S.A. 21-5505 [formerly K.S.A. 21-3518]; promoting prostitution if the prostitute is 14 or more years of age but less than 18 years of age; or any attempt, conspiracy or criminal solicitation of any of these offenses.
- **Lifetime** registration shall be required for:
 - Second or subsequent conviction of any offense requiring registration;
 - Rape; aggravated indecent solicitation of a child as defined in subsection (b) of K.S.A. 21-5508 [formerly K.S.A. 21-3511]; aggravated indecent liberties with a child as defined in subsection (b) of K.S.A. 21-5506 [formerly K.S.A. 21-3504]; criminal sodomy as defined in subsection (a)(3) or (a)(4) of K.S.A. 21-5504 [formerly subsection (a)(2) or (a)(3) of K.S.A. 21-3505]; aggravated criminal sodomy as defined in subsection (b) of K.S.A. 21-5504 [formerly K.S.A. 21-3506]; aggravated human trafficking as defined in subsection (b) of K.S.A. 21-5426 [formerly K.S.A. 21-3447] if the victim is less than 18 years of age; sexual exploitation of a child less than 14 years of age; promoting prostitution if the prostitute is less than 14 years of age; kidnapping as defined in subsection (a) of K.S.A. 21-5408 [formerly K.S.A. 21-3420]; aggravated kidnapping as defined in subsection (b) of K.S.A. 21-5408 [formerly K.S.A. 21-3421]; or any attempt, conspiracy or criminal solicitation of any of these offenses;
 - Any person who has been declared a sexually violent predator.
- **Juvenile** registration:
 - For juveniles less than 14 years of age who are adjudicated for an act which if committed by an adult would be considered a sexually violent crime, the court shall:
 - Require registration until the offender turns 18, or the expiration of five years from the date of adjudication, or, if confined, from release from confinement, whichever date occurs later, or
 - Not require registration if the court, on the record, finds substantial and compelling reasons against requiring registration; or
 - Require registration, but such registration shall not be open to inspection by the public or posted on any internet website.
 - For juveniles 14 or more years of age who are adjudicated for an act which if committed by an adult would be considered a sexually violent crime, and such crime is **not** an off-grid felony or a nondrug severity level 1 felony, the court shall:

- Require registration until the offender turns 18, at the expiration of five years from the date of adjudication, or, if confined, from release from confinement, whichever date occurs later, or
- Not require registration if the court, on the record, finds substantial and compelling reasons therefore; or
- Require registration but such registration shall not be open to inspection by the public or posted on any internet website.
- Juveniles 14 or more years of age who are adjudicated for an act which if committed by an adult would be considered a sexually violent crime, and such crime **is** an off-grid felony or a nondrug severity level 1 felony, shall register for such offender's lifetime.

Court Responsibilities at Sentencing

The bill, in amendments to K.S.A. 22-4904, requires the sentencing court to inform the offender, on the record, of the procedure to register and the registration requirements of K.S.A. 22-4905. If an offender subject to registration receives a non-prison sanction the court must also see to the completion of the initial registration forms, confirm that the forms have been explained to the offender, require the offender to read and sign the forms, and order the offender to report within 3 days to the statutorily determined registering law enforcement agency.

Offender Responsibilities

The bill amends existing law by requiring offenders to register within 3 business days of coming into a county in which the offender intends to reside, maintain employment or attend school. *Sex offenders are required to report in person four times per year. Violent offenders and drug offenders are required to report in person four times per year, except that, at the discretion of the registering law enforcement agency, one of the four required reports may be by certified letter.*

Penalty for Failure to Register

The bill also amends, in new K.S.A. 22-4903, penalties for violations of KORA as follows:

- First failure to register is now a *severity level 6, person felony*;
- *Second failure to register is a severity level 5, person felony*;
- *Third or subsequent failure to register is a severity level 3, person felony*;
- Creates the new felony of aggravated failure to register, defined as a failure to register for more than 180 consecutive days. *Aggravated failure to register is a severity level 3, person felony.*
- Each violation that continues for more than 30 or 180 consecutive days shall, upon the 31st or 181st consecutive day, constitute a separate and new offense, and shall continue to constitute a separate offense every 30 or 180 days thereafter.

Expungement

Finally, House Substitute for SB 37 amends the expungement statute [formerly K.S.A. 21-4619, to be codified at K.S.A. 21-6614] to provide that for any offender required to register as provided in the Kansas Offender Registration Act, there shall be no expungement of any conviction or any part of the offender's criminal record while the offender is required to register.

The bill was approved by the Governor and became effective July 1, 2011.

House Substitute for Senate Bill 55 - Reconciliation Bill

House Arrest

House Substitute for Senate Bill 55 amends K.S.A. 2010 Supp. 12-4509 to allow municipal judges to sentence a defendant convicted of violating an ordinance to house arrest.

K.S.A. 21-6609 [formerly K.S.A. 21-4603b] provides that house arrest may be imposed as a sanction for offenders who fail to comply with conditions of probation, parole or postrelease supervision unless the offender has been convicted of any of the disqualifying crimes listed. House arrest is not authorized if the offender was convicted of any off-grid felony, any nondrug crime ranked in severity levels 1 through 5, or any drug felony ranked in severity levels 1 through 3, unless the offender was sentenced to probation.

In addition, the bill sets out the specific requirements for placing someone on house arrest including that the offender must remain within the property boundaries of the residence and be electronically monitored. Second-time DUI offenders placed on house arrest must serve 120 hours of confinement within the boundaries of the residence. Third or subsequent DUI offenders placed on house arrest must serve 240 hours of confinement within the residential boundaries. Any exceptions to remaining within the residential boundaries shall not be counted towards the 120 or 240 minimum hours of confinement.

K.S.A. 21-6804 [formerly K.S.A. 21-4704] allows a court to consider assigning a defendant to a house arrest program prior to imposing a sentence for nondrug-grid crimes.

Expungement

All expungement statutes are amended to provide that the court *shall make all expunged records and related information created prior to, on and after July 1, 2011, available to the KBI for the purposes of completing a person's criminal history record information within the central repository or for the purposes of providing information or documentation to the FBI in connection with the national instant background check system, to determine a person's qualification to possess a firearm.*

Juvenile expungement pursuant to K.S.A. 2010 Supp. 38-2312, as well as adult expungement pursuant to K.S.A. 21-6614 [formerly K.S.A. 21-4619], are amended to provide that for any offender required to register as provided in the Kansas Offender Registration Act, *there shall be no expungement of any conviction or any part of the offender's criminal record while the offender is required to register.*

Grand Juries

The bill amends K.S.A. 22-3001 concerning grand juries, to allow the district or county attorney in such attorney's county to petition the chief judge or the chief judge's designee in such district court to order a grand jury to be summoned in the designated county in the district to investigate alleged violations of an off-grid felony, a severity level 1, 2, 3 or 4 felony or a drug severity level 1 or 2 felony. The chief judge or the chief judge's designee in the district court of the county shall then consider the petition and, if it is found that the petition is in proper form, shall order a grand jury to be summoned.

Direct Appeals for Certain Off-Grid Offenses

The bill amends K.S.A. 22-3601 to clarify which cases shall be appealed directly to the Kansas Supreme Court, rather than to the Court of Appeals. Those cases are:

- Any case in which a statute of this state or of the United States has been held unconstitutional;
- Any case in which the defendant has been convicted of a class A felony;
- Any case in which a maximum sentence of life imprisonment has been imposed, unless the maximum sentence has been imposed pursuant to K.S.A. 21-4643, prior to its repeal, or K.S.A. 21-6627; and
- Except as provided further, any case in which the crime was committed on or after July 1, 1993, and the defendant has been convicted of an off-grid crime;
- Direct appeal to the Kansas Supreme Court shall not apply if the off-grid crime was any of the following, when committed by an offender 18 years of age or older and the victim was under 14 years of age:
 - Aggravated Human Trafficking;
 - Rape;
 - Aggravated Criminal Sodomy;
 - Aggravated Indecent Liberties with a Child;
 - Sexual Exploitation of a Child;
 - Promoting Prostitution;
 - An Attempt, Conspiracy, or criminal Solicitation of any of the above.

Community Corrections

The bill amends K.S.A. 2010 Supp. 75-5291(a)(3) by extending the sunset provision of the section to *July 1, 2013*. The section provides that adult offenders sentenced to community supervision in Johnson County for certain felonies can be placed under court services or community corrections supervision based on court rules issued by the chief judge of the 10th judicial district.

Sexual Exploitation of a Child

K.S.A. 21-5510 [formerly K.S.A. 21-3516], amends the crime of Sexual Exploitation of a Child to allow punishment if the offender believes a child to be under 18 years of age as listed below:

- Subsection (a)(1); Employing, using, persuading, inducing, enticing or coercing a child under 18 years of age, *or a person whom the offender believes to be under 18 years of age*, to engage in sexually explicit conduct with the intent to promote any performance; or
- Subsection (a)(4); Promoting any performance that includes sexually explicit conduct by a child under 18 years of age, *or a person whom the offender believes to be under 18 years of age*, knowing the character and content of the performance.

In addition, the penalty section incorporates amendments from section 32 of 2011 HB 2339 which clarify that a violation of subsections (a)(1) or (a)(4), *or an attempt, conspiracy or solicitation to commit such violations*, when committed by one 18 years of age or older and the victim is under 14 years of age, are off-grid person felonies. Furthermore, if the offender is 18 years of age or more and the victim is under 14 years of age, the provisions of attempt, conspiracy or solicitation shall not apply to reduce the severity level or length of sentence imposed.

Harassment by Telecommunication Device (a.k.a. “sexting”)

K.S.A. 21-6206 [formerly K.S.A. 21-4113] expands its application to include the use of a telecommunication device to transmit an obscene, lewd, lascivious, or indecent *image or text*. The bill also makes it illegal to use a telecommunication device to *transmit any comment, request, suggestion, proposal, image, or text with intent to abuse, threaten, or harass any person at the receiving end*. In addition, it is illegal to cause a telecommunication device to repeatedly *ring or activate* with the intent to harass any person at the receiving end. The offense is a class A nonperson misdemeanor.

A person charged with harassment by telecommunication device may also be charged with and convicted of indecent solicitation of a child, aggravated indecent solicitation of a child, electronic solicitation, sexual exploitation of a child, or promoting obscenity.

New Sentencing Rule: Seconded and Subsequent Identity Theft/Identity Fraud Convictions

New subsection (u) is added to K.S.A. 2011 Supp. 21-6804 [formerly K.S.A. 21-4704] to require presumptive imprisonment if an offender is convicted of identity theft or identity fraud or any attempt or conspiracy to commit such offense, when the offender has a prior conviction for identity theft or identity fraud or any attempt or conspiracy to commit such offense. Such shall not be considered a departure and shall not be subject to appeal.

This bill was approved by the Governor and became effective July 1, 2011.

Senate Bill 97 - Court Fees and Costs

Court Fees and Judicial Branch Surcharge

Senate Bill 97 pertains primarily to court fees and amends expungement statutes to consistently provide that a petition for expungement shall be accompanied by a docket fee in the amount of \$100. On and after July 1, 2011, through *June 30, 2012*, the Kansas Supreme Court may impose an additional charge not to exceed \$19 per case.

This bill was approved by the Governor and became effective July 1, 2011.

Senate Bill 112 - County Surveyors

Interference with Surveyors

Senate Bill 112 amends K.S.A. 19-1413(b) to provide that *threatening or improperly interfering with any county surveyor or such surveyor's deputy, during the performance of official duties is a class A nonperson misdemeanor.*

This bill was approved by the Governor and became effective July 1, 2011.

Senate Bill 227 - Anemometer Towers

Failure to Mark Anemometer Towers

Senate Bill 227 establishes daylight marking requirements for anemometer towers which measure and record wind speed. Subsection (b) requires specific daylight visibility markings for any anemometer tower that is at least 50 feet in height and that is located outside the corporate boundaries of a city, provided the appearance of the tower is not otherwise mandated by state or federal law.

Subsection (c) provides that *failure by an owner of an anemometer tower to properly mark the tower is a class C nonperson misdemeanor.*

This bill was approved by the Governor and became effective July 1, 2011.

Senate Bill 247 - Reconciliation Bill

Mistreatment of Dependent Adults

Senate Bill 247 amends K.S.A. 21-5417 [formerly 21-3437] concerning mistreatment of dependent adults to bring it into conformance with the amendments made in section 1 of chapter 88 of the 2010 Session Laws. The changes move the penalty section to subsection (b) from subsection (d) and rewrite it to be more concise and consistent with the recodification format.

Penalty for Partial Birth Abortion

The bill amends K.S.A. 65-6721(g), which prohibits, with specified exceptions, the performance of partial birth abortions. The felony classification of a violation of this statute is increased from severity level 10 person felony to a level 8 person felony.

The bill was approved by the Governor and became effective July 1, 2011

House Bill 2010 – Civil Forfeiture

Forfeiture

House Bill 2010 adds the following to the list of offenses giving rise to civil forfeiture pursuant to K.S.A. 2010 Supp. 60-4104, the Kansas Asset Seizure and Forfeiture Act:

- Embezzlement;
- Mistreatment of a Dependent Adult;
- Giving a Worthless Check;
- Forgery;
- Making False Information;
- Criminal use of a Financial Card;
- Unlawful Acts Concerning Computers;
- Identity Theft and Fraud; and
- Electronic Solicitation.

The bill removes theft of livestock from the Kansas Asset Seizure and Forfeiture Act; however, theft as defined in K.S.A. 21-5801 [formerly K.S.A. 21-3701], remains listed.

This bill was approved by the Governor and became effective July 1, 2011.

House Bill 2023 – Controlled Substances

Schedules of Controlled Substances

House Bill 2023 amends K.S.A. 65-4107, 65-4109, 65-4111 and K.S.A. 2010 Supp. 65-4105 and 65-4113, by adding to the scheduling of controlled substances, to bring Kansas' law into agreement with the federal schedule.

This bill was approved by the Governor and became effective July 1, 2011.

House Bill 2035 – Child Abuse

Reporting Child Abuse

House Bill 2035 amends K.S.A. 2010 Supp. 38-2223 to provide that *any person employed by or who works as a volunteer for any organization, whether for profit or not-for-profit, that provides social services to pregnant teenagers, including but not limited to, counseling, adoption services and pregnancy education and maintenance* is required to report any suspected child abuse.

Willful and knowing failure to make a report; intentionally preventing or interfering with the making of a report; and willfully and knowingly making a false report are still class B misdemeanors.

The bill was approved by the Governor and became effective July 1, 2011.

House Bill 2044 – Requirements after Motor Vehicle Accident

Failure to Remain at the Scene of an Accident

House Bill 2044 amends K.S.A. 2010 Supp. 8-1602 to add accidents resulting in damage to an attended vehicle or property to the list of vehicle accidents requiring a person to immediately stop and remain at the scene. Further, the bill amends penalties for leaving the scene of an accident as follows:

- *Total property damage of less than \$1,000 shall be a misdemeanor, and upon conviction, shall be punished as provided in K.S.A. 8-2116.*
 - K.S.A. 8-2116 provides that a first conviction shall be a class C misdemeanor, a second committed within one year of the first shall be a class B misdemeanor and a third or subsequent committed within one year of the first shall be a class A misdemeanor.
- Injury to any person *or total property damages in excess of \$1,000 or more* shall be a class A person misdemeanor.
- Great bodily harm to a person is increased from a severity level 10 to a *severity level 8*, person felony.
- Death of a person is increased from a severity level 9 to a *severity level 6*, person felony; except when a person involved in an accident *knew or should have known that the accident resulted in injury or death*, the penalty shall be a *severity level 5*, person felony.

Failure to Contact Owner

The bill amends K.S.A. 2010 Supp. 8-1605 to require the driver of any vehicle which collides with or is involved in an accident with any vehicle or other property which is unattended, resulting in damage to such vehicle or property, to stop immediately and locate the owner to provide the owner with required information or attach securely in a conspicuous place in or on the vehicle or property the required information. Violation shall be punished as provided in K.S.A. 8-2116 which provides that a first conviction for a violation shall be a class C misdemeanor, a second committed within one year of the first shall be a class B misdemeanor, and third or subsequent committed within one year of the first shall be a class A misdemeanor.

Criminal History

K.S.A. 2011 Supp. 21-6811 [formerly K.S.A. 21-4711] provides that if a person is convicted of leaving the scene of an accident resulting in damage \$1000 or greater, injury to any person, great bodily harm to any person, or death of any person, each of the following prior convictions committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one's privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver's license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;
- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;
- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- Subsection (a)(3) of K.S.A. 2011 Supp. 21-5405 [formerly K.S.A. 21-3442], involuntary manslaughter committed while DUI; and
- K.S.A. 2011 Supp. 21-5406 [formerly K.S.A. 21-3405], vehicular homicide
- Or a violation of a city ordinance or law of another state which would also constitute a violation of such sections.

This bill was approved by the Governor and became effective July 1, 2011.

Senate Substitute for House Bill 2049 – Controlled Substances

Distribution or Possession with Intent to Distribute

Senate Substitute for House Bill 2049 amends K.S.A. 2010 Supp. 65-4105, Schedule I controlled substances, by creating new subsection (h) to include classes of synthetic marijuana commonly referred to as K-3. It also adds to subsection (e) classes of substituted cathinones, commonly known as bath salts.

The bill also amends K.S.A. 2010 Supp. 21-36a05 and 21-36a06 (to be codified at K.S.A. 2011 Supp. 21-5705 and 21-5706), crimes involving controlled substances, by adding K-3 and bath salts to the lists of substances that are illegal to cultivate, distribute, possess, or possess with intent to distribute. The penalty for distribution of or possession with intent to distribute these substances is a drug severity level 3 felony. The penalty for possession of these substances is a class A nonperson misdemeanor, unless such person has a prior conviction for possession, then it becomes a drug severity level 4 felony.

This bill was approved by the Governor and became effective May 26, 2011.

House Bill 2067 – Elections

Advance Voting Offenses

House Bill 2067 amends K.S.A. 2010 Supp. 25-1128, to clarify that the standard of culpability for advance voting crimes is “knowingly.”

The bill amends K.S.A. 2010 Supp. 25-1128 by creating new subsection (d) providing that *no person shall knowingly sign an application for an advance voting ballot for another person. This provision shall not apply if a voter has a disability preventing the voter from signing or if an*

immediate family member signs an application on behalf of another immediate family member with proper authorization.

The bill also amends K.S.A. 2010 Supp. 25-1128 by adding subsection (g) providing that *upon written designation by the voter, a person other than the voter may return the advance voting ballot by personal delivery or mail. Any such person designated by the voter shall sign a statement that such person has not exercised undue influence on the voting decisions and agrees to deliver the ballot as directed by the voter.*

A conviction of an advance voting offense is a class C misdemeanor.

This bill was approved by the Governor and shall be effective January 1, 2012.

Senate Substitute for House Bill 2134 – Workers’ Compensation

Exempt Status

Senate Substitute for House Bill 2134, authorizes the Commissioner of Insurance to establish an affidavit form by which a person or company may establish a rebuttable presumption that the executor is not an employee for purposes of the workers’ compensation act and that an individual or company possessing the affidavit is in compliance and therefore shall not be responsible for workers’ compensation claims made by the executor.

Knowingly providing false information on a notarized affidavit of exempt status is an unclassified misdemeanor, punishable with a fine up to \$1,000.

This bill was approved by the Governor and became effective April 28, 2011.

Senate Substitute for House Bill 2135 – Employees

Misclassification of Employees

Senate Substitute for House Bill 2135 amends K.S.A. 2010 Supp. 44-766 relating to the penalties for misclassification of employees to avoid tax withholding, contributions and reporting requirements.

- *A first violation shall be subject to a civil penalty computed pursuant to K.S.A. 79-3228;*
- *A second violation shall be subject to a civil penalty and upon conviction, shall be guilty of a class C nonperson misdemeanor;*
- *A third and subsequent violation shall be subject to a civil penalty and upon conviction, shall be guilty of a class A nonperson misdemeanor.*

This bill was approved by the Governor and became effective July 1, 2011.

House Bill 2151 – Breach of Privacy and Blackmail

Breach of Privacy

House Bill 2151 amends K.S.A. 2011 Supp. 21-6101, combines the crimes of breach of privacy and eavesdropping as formerly defined in K.S.A. 21-4001 and 21-4002. It expands the definition of the crime of breach of privacy and increases certain penalties for the crimes. The following are class A nonperson misdemeanors, knowingly and without lawful authority:

- (a)(1) Intercepting, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication. [Formerly K.S.A. 21-4002(a)(1)].
- (a)(2) Divulging, without consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted. [Formerly K.S.A. 21-4002(a)(2)].
- (a)(3) Entering into a private place with intent to listen surreptitiously to private conversations or to observe the personal conduct of another person or persons entitled to privacy therein. [Formerly K.S.A. 21-4001(a)(1)].
- (a)(4) Installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the persons entitled to privacy. [Formerly K.S.A. 21-4001(a)(2)].
- (a)(5) Installing or using any device or equipment for the interception of any telephone, telegraph or other wire or wireless communication without the consent of the person in possession or control of facilities for such communication. [Formerly K.S.A. 21-4001(a)(2)].

K.S.A. 2011 Supp. 21-6101(a)(6) [formerly K.S.A. 21-4002] increases the penalty from a class A misdemeanor to a *severity level 8, person felony* for installing or using a concealed camcorder, motion picture camera or a photographic camera of any type, to secretly videotape, film, photograph or record by electronic *or other* means, another, identifiable person under or through the clothing being worn by that other person or another, identifiable person who is nude or in the state of undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to invade the privacy of that person, under circumstances in which the other person has a reasonable expectation of privacy.

The bill also adds subsection (a)(7) to create a crime of breach of privacy by *disseminating or permitting the dissemination of any videotape, photograph, film or image obtained in violation subsection (a)(6) as provided above*. The penalty is now a *severity level 5, person felony*.

Blackmail

K.S.A. 2011 Supp. 21-5428 [formerly K.S.A. 21-3428] expands the definition of blackmail by adding subsection (a)(2). Blackmail is gaining or attempting to gain anything of value or compelling or attempting to compel another to act against such person's will, by threatening to:

- (a)(1) Communicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation. The penalty for this violation is a severity level 7, nonperson felony.
- (a)(2) *Disseminate any videotape, photograph, film, or image obtained in violation of subsection (a)(6) of K.S.A. 21-6101 [formerly K.S.A. 21-4002] as listed above under Breach of Privacy*. The penalty for this violation is a *severity level 4, person felony*.

Note: Section 28 of HB 2339 also adds the culpability term “intentionally” to the definition of

blackmail so that it reads, “Blackmail is *intentionally* gaining or attempting to gain. . .”

This bill was approved by the Governor and became effective July 1, 2011.

House Bill 2218 - Abortion

Restrictions on Late Term Abortions

House Bill 2218 enacts new statutory restrictions on certain late term abortions. The bill defines a “pain-capable” child as an unborn child that has reached the gestational age of 22 weeks or more.

Penalty for Late Term Abortion

K.S.A. 65-6724 prohibits performing abortions on a “pain-capable” child. *The first violation shall be a class A person misdemeanor. A second or subsequent conviction of this offense shall be a severity level 10, person felony.*

The bill was approved by the Governor and became effective July 1, 2011.

House Bill 2240 – Cemetery Corporations

Misuse of Cemetery Merchandise Trust Fund

House Bill 2240 amends K.S.A. 16-323 to specifically define the crime of *misuse of the cemetery merchandise trust fund or any money belonging thereto as knowingly using, investing, lending or permitting another to use moneys in the fund in a manner not authorized by law.*

The bill increases the penalty from a class A misdemeanor to a *severity level 7, nonperson felony.*

Misuse of Permanent Maintenance Fund

The bill also amends K.S.A. 17-1311(a) pertaining to misuse of the permanent maintenance fund to clarify that the culpability standard shall be “knowingly”. The penalty for violation remains a severity level 7, nonperson felony.

This bill was approved by the Governor and shall be effective January 1, 2012.

House Bill 2312 – Regulated Scrap Metal

Business Registration Required

House Bill 2312 provides that, effective January 1, 2012, in order to purchase regulated scrap metal, each place of business must first register as required in the bill. If the place of business is located within the corporate limits of a city, the registration shall be made to the governing body of such city. In all other cases, the registration shall be made to the board of county commissioners. Violation of this act is a *class A nonperson misdemeanor.*

Theft Definitions

K.S.A. 21-5801 [formerly K.S.A. 21-3701] changes the property damage value when scrap metal is the property taken. “Value” is defined under the bill as the value of the property or, if the property is regulated scrap metal, the cost to restore the site of the theft to its condition immediately prior to the

taking of the scrap, *whichever is greater*. The penalties for theft of regulated scrap metal are equivalent to theft of property crimes.

This bill was approved by the Governor and became effective July 1, 2011.

House Bill 2339 – Reconciliation Bill

House Bill 2339 reconciles all of the changes to Kansas Criminal Code that were not made during the regular session of the 2010 Legislature in 2010 House Bill 2668. This includes the recodification, all new crimes created, and other amendments to existing crimes.

Maintenance of Common Nuisance, K.S.A. 2011 Supp. 22-3905

The bill creates a new crime and penalty pertaining to common nuisances. *Maintaining or assisting in the maintenance of a common nuisance as described by K.S.A. 22-3901 is a class A nonperson misdemeanor*. In addition to the sentence authorized by law, the offender may be fined in an amount not to exceed \$25,000.

Domestic Battery

K.S.A. 2011 Supp. 21-5414 [formerly K.S.A. 21-3412a] is amended to add the culpability term “knowingly” to subsection (a)(1) for consistency within the definitions of domestic battery.

Human Trafficking and Aggravated Human Trafficking

K.S.A. 2011 Supp. 21-5426 [formerly K.S.A. 21-3446] is amended to add the culpability terms “intentional” and “intentionally” to subsections (a)(1) and (a)(2) respectively. The culpability term “knowingly” is added to subsection (a)(3).

Blackmail

K.S.A. 2011 Supp. 21-5428 [formerly K.S.A. 21-3428] is amended to add the culpability term “intentionally” to the definition of the offense. **Note:** HB 2151 also amended this statute as set out above.

Aggravated Escape from Custody

K.S.A. 2011 Supp. 21-5911 [formerly K.S.A. 21-3810] amends the penalty for aggravated escape from custody affected or facilitated by the use of violence or the threat of violence to make a violation a *person* felony rather than a nonperson felony.

Unlawful Possession of a Traffic Control Preemption Device

K.S.A. 2011 Supp. 21-6324 [formerly K.S.A. 21-4223] is amended to change the penalty levels for violations as follows:

- Unlawful possession of such device remains a class B misdemeanor.
- Unlawful purchase of or selling of a traffic control preemption device is a *severity level 9, nonperson felony*.
- Unlawful use of such device is a *severity level 9, nonperson felony* unless such use causes a traffic accident.
- Unlawful use of such device, *which results in a traffic accident causing injury to any person or damage to any vehicle, is a severity level 7, person felony*.

- Unlawful use of such device, *which results in a traffic accident causing the death of any person, is a severity level 5, person felony.*

Cruelty to Animals

K.S.A. 2011 Supp. 21-6412(a)(6) [formerly K.S.A. 21-4310] is amended to provide that the culpability standard for a violation of administering any poison to any domestic animal shall be “knowingly and maliciously”.

Dog Fighting

K.S.A. 2011 Supp. 21-6414 [formerly K.S.A. 21-4315] is amended to clarify that causing, for amusement or gain, any dog to fight with or injure another dog is a strict liability offense, *with no requirement of culpable mental state.*

Sentencing

Subsection (c)(4) of K.S.A. 21-6608 [formerly K.S.A. 21-4611] is amended to provide that in felony cases sentenced pursuant to K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 21-4729, SB 123 cases], if a nonprison sanction is imposed, the court shall order the defendant to serve a period of probation, or assignment to community corrections, of up to 18 months in length.

Child Sex Offense Mandatory Sentence

K.S.A. 2011 Supp. 21-6627 [formerly K.S.A. 21-4643] is amended to clarify that the provision of attempt, conspiracy and solicitation which serve to reduce the severity level or length of sentence shall not apply to defendants sentenced pursuant to this statute.

Perjury

K.S.A. 44-1039 is amended to replace the terms “willfully and knowingly” with the culpability term “intentionally”.

Child Abuse

K.S.A. 2011 Supp. 21-5602 [formerly K.S.A. 21-3609] is amended to clarify the potential violations by removing the violation of “shaking any child under the age of 18 years which results in great bodily harm to the child” from subsection (a)(1) and placing it alone in subsection (a)(2). Subsection (a)(1) now provides that any “torturing or cruelly beating any child under the age of 18 years” is a violation. Abuse of a child is a severity level 5, person felony.

Cockfighting

K.S.A. 2011 Supp. 21-6417 [formerly K.S.A. 21-4319] is amended to clarify that causing, for amusement or gain, any gamecock to fight with or injure or kill another gamecock is a strict liability offense, *with no requirement of culpable mental state.* In addition the statute is amended to provide that unlawful possession of cockfighting paraphernalia requires *intent to use such in the unlawful conduct of cockfighting.*

This bill was approved by the Governor and became effective July 1, 2011.

CHAPTER I: THE BASICS OF THE SENTENCING GUIDELINES

SENTENCING CONSIDERATIONS

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in typical case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals will continue their efforts in reestablishing offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases, but departures are only legislatively authorized when the sentencing court properly follows statutory departure procedures. K.S.A. 21-6802 [formerly K.S.A. 21-4702].

SENTENCING GUIDELINES AND GRIDS

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. K.S.A. 21-4701 *et seq.* The revised KSGA will be found at K.S.A. 2011 Supp. 21-6801 *et seq.*, effective July 1, 2011. The KSGA provides for determinate sentencing based on sentencing charts or “grids.” Each sentencing grid is a two-dimensional crime severity and criminal history classification tool. The grid's vertical axis is the crime severity scale which classifies current crimes of conviction. The grid's horizontal axis is the criminal history scale which classifies criminal histories. The provisions for the nondrug crime grid are at K.S.A. 21-6804, [formerly K.S.A. 21-4704]. The provisions for the drug crime grid are at K.S.A. 21-6805, [formerly K.S.A. 21-4705]. The presumptive sentence is determined by two factors: the severity level of the current crime of conviction and the offender's criminal history. The grid block at the intersection of the severity level of the crime of conviction and the offender's criminal history score provides the presumed sentencing range, and includes prescribed aggravated, standard and mitigated sentences in months. Each grid also contains a dispositional line: grid blocks above the line presume a sentence of imprisonment; grid blocks below the line presume a sentence of probation. Each grid also includes border blocks or boxes, which are above the dispositional line and therefore presume imprisonment, but which provide that the court may impose an optional nonprison sentence, i.e., probation. See K.S.A. 2011 Supp. 21-6804 [formerly K.S.A. 2010 Supp. 21-4704] and K.S.A. 2011 Supp. 21-6805 [formerly K.S.A. 2010 Supp. 21-4705]. The grids can be found in Appendix D, and are the final two pages of this Manual.

OFF-GRID CRIMES

Off-grid offenses, by definition, are not subject to the classifications of the KSGA. Off-grid crimes include the most serious of criminal offenses and provide lengthy sentences regardless of prior criminal history. The crimes of capital murder K.S.A. 2011 Supp. 21-5401, [formerly K.S.A. 21-3439]), murder in the first degree K.S.A. 2011 Supp. 21-5402, [formerly K.S.A. 21-3401], treason K.S.A. 2011 Supp. 21-5901, [formerly K.S.A. 21-3801], terrorism, or an attempt, solicitation, or conspiracy to commit same K.S.A. 2011 Supp. 21-5421, [formerly K.S.A. 21-3449], illegal use of weapons of mass destruction, or an attempt, solicitation or conspiracy to commit same, as defined in K.S.A. 2011 Supp. 21-5422 [formerly K.S.A. 21-3450], and several specific sex offenses involving victims less than 14 years of age and offenders 18 years of age or older are designated as off-grid person crimes. For such crimes, the term of imprisonment shall be imprisonment for life. K.S.A. 2011 Supp. 21-6806 [formerly K.S.A. 21-4706]. However, such a life sentence does not necessarily

mean that the offender will remain imprisoned for the remainder of the offender's life. Generally, an offender will become eligible for parole after serving a mandatory minimum term of years in confinement. The exceptions are for convictions of capital murder wherein the death penalty is not imposed and for convictions as an aggravated habitual sex offender; such life sentences are imposed without the possibility of parole.

A person convicted of premeditated first-degree murder will be eligible for parole after serving 25 years in confinement unless the court finds that aggravating circumstances exist and such aggravating circumstances are not outweighed by any mitigating circumstances. In that case, the person shall serve 40 or 50 years pursuant to K.S.A. 2011 Supp. 21-6623 [formerly K.S.A. 21-4638] before becoming eligible for parole, and is not entitled to good time credit. See K.S.A. 2011 Supp. 22-3717(b)(1), K.S.A. 2011 Supp. 21-6620(b), (d) and 21-6623 [formerly K.S.A. 21-4635(b), (d)], and 21-4638) (hard 40 for crimes committed prior to July 1, 1999, hard 50 for crimes committed on or after July 1, 1999). For crimes committed on or after July 1, 2006 where a hard 50 sentence could be imposed, such sentence will not be imposed if the offender's criminal history would result in a guidelines sentence in excess of 600 months. In that case, the mandatory minimum will be the 600+ months as provided by the guidelines grid. K.S.A. 2011 Supp. 21-6623 [formerly K.S.A. 21-4638].

Felony murder and treason carry terms of life imprisonment with eligibility for parole after serving 15 years for crimes committed after July 1, 1993 but prior to July 1, 1999, and 20 years for crimes committed on or after July 1, 1999. See K.S.A. 2011 Supp. 22-3717(b)(2).

In 2006, Kansas' version of Jessica's Law, Senate Substitute for House Bill 2576, was enacted and designated certain sex offenses involving victims less than 14 years of age and offenders 18 years of age or older as off-grid felonies. If an offender is convicted of one of these off-grid sex offenses, the sentence shall be imprisonment for life pursuant to K.S.A. 2011 Supp. 21-6627 [formerly K.S.A. 2010 Supp. 21-4643], with a mandatory minimum term of imprisonment of 25 years before parole eligibility on the first such sex offense, or a mandatory minimum term of 40 years on a second such offense. However, if the offender is determined to be an aggravated habitual sex offender, the sentence would be imprisonment for life without the possibility of parole. K.S.A. 2011 Supp. 21-6626 [formerly K.S.A. 2010 Supp. 21-4642].

As with the aggravated habitual sex offender statute, K.S.A. 2011 Supp. 21-6620 [formerly K.S.A. 21-4635] provides that if a person is convicted of capital murder where the crime was committed on or after July 1, 2004, and a sentence of death is not imposed pursuant to K.S.A. 2011 Supp. 21-6617 [formerly K.S.A. 21-4624], such person shall be sentenced to life imprisonment without the possibility of parole. If the crime of capital murder was committed prior to July 1, 2004, and the death penalty was not imposed, the mandatory minimum term of imprisonment would be 25 years unless aggravating factors were found to outweigh any mitigating ones. In that case, the term would be either 40 or 50 years as with premeditated first degree murder. K.S.A. 2011 Supp. 21-6620 [formerly K.S.A. 21-4635]. The death penalty and the sentence of life imprisonment without parole do not apply to juveniles or persons determined to be mentally retarded.

If an off-grid offender is released from imprisonment, that offender is placed on supervised parole. If a guidelines offender is released, that offender, if on supervision at all, is on postrelease supervision.

DRUG GRID AND NONDRUG GRID

As noted above, there are two grids used for sentencing on felony convictions. The drug grid is used for sentencing of drug crimes under the Kansas version of the uniform controlled substances act. Prior versions of the Act were at K.S.A. 65-4101 *et seq.*, then briefly at K.S.A. 21-36a01 *et seq.*, and recently recodified in K.S.A. Chapter 21, Article 57. The nondrug grid is used for sentencing of all other felony crimes. The criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis. Each grid contains nine criminal history categories. The drug grid contains four severity levels while the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line the grid blocks are designated as presumptive prison sentences. Below the dispositional line are shaded grid blocks, which are designated as presumptive probation sentences.

The grids also contain blocks that may have lines passing through them, or, in this Manual, darker shading, which are referred to as “border boxes.” The nondrug grid contains three border boxes, in levels 5-H, 5-I and 6-G. The drug grid contains five border boxes, in levels 3-E, 3-F, 3-G, 3-H and 3-I. See K.S.A. 2011 Supp. 21-6804 and 21-6805 [formerly K.S.A. 2010 Supp. 21-4704 and 21-4705]. The court has the power to grant border box probation without departing from the grid (which otherwise would require a finding of substantial and compelling reasons) if the court makes the following findings on the record: “(1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and (2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or (3) the nonprison sanction will serve community safety interests by promoting offender reformation.”

GRID BLOCKS

Within each grid block are three numbers, representing months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence at any place within the range. The middle number in the grid block is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors insufficient to warrant a departure. See K.S.A. 2011 Supp. 21-6804 and 21-6804 [formerly K.S.A. 2010 Supp. 21-4704 and 21-4705].

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid block. The court may also depart downward to lower the duration of a presumptive sentence. See K.S.A. 2011 Supp. 21-6816, 21-6815 and 21-6817 [formerly K.S.A. 2010 Supp. 21-4717, K.S.A. 21-4716, and K.S.A. 21-4718]. The court may also impose a dispositional departure when aggravating or mitigating circumstances exist that are substantial and compelling. See K.S.A. 2011 Supp. 21-6818(c)(2) [formerly K.S.A. 2010 Supp. 21-4719(c)(2)].

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), applying *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), the Kansas Supreme Court held that K.S.A. 2000 Supp. 21-4716 was “unconstitutional on its face” concerning the imposition of upward durational departure sentences. The procedure under that statute allowed a judge to determine whether aggravating factors existed to justify an upward durational departure sentence. *Apprendi* and *Gould* stand for the proposition that any fact, other than criminal history, which enhances a penalty beyond the statutory maximum, must be submitted to a jury and proven beyond a reasonable doubt. In the

2002 Legislative Session, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to attempt to remedy the constitutional defects in the upward durational departure statutes determined in *Gould*. These changes became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 2011 Supp. 21-6815(b) [formerly K.S.A. 21-4716]. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter, or in a bifurcated jury proceeding following the trial. K.S.A. 2011 Supp. 21-6817(b)(2) [formerly K.S.A. 21-4718].

CHAPTER II: PROCEDURE PRIOR TO SENTENCING

DETERMINATION OF THE DATE OF OFFENSE; APPLICATION TO THE SENTENCING GUIDELINES

The Kansas Sentencing Guidelines Act (KSGA) applies to all felony crimes committed on or after July 1, 1993. All felony crimes committed prior to that date should be prosecuted under the laws existing prior to that date. A crime is committed prior to July 1, 1993, if any essential elements of the crime as then defined occurred before July 1, 1993. If it cannot be determined that the crime was committed prior to or after July 1, 1993, the offender should be prosecuted under laws existing prior to the KSGA. See K.S.A. 2011 Supp. 21-6802 [formerly K.S.A. 21-4723].

The date of offense controls selection of the appropriate journal entry form. Each year the Kansas Sentencing Commission modifies the Presentence Investigation Report form and the Journal Entry of Judgment form to comport with the laws and special sentencing rules in effect beginning July 1 of that year. Therefore, when completing a PSI or journal entry form make sure that the year of the form corresponds with the laws in effect for the date of offense. Examples: For an offense committed on May 1, 2001, complete the 2000 Journal entry form. For an offense committed October 7, 1996, the 1996 Journal entry form should be completed. Forms from prior years may be found at the Kansas Sentencing Commission website: www.kansas.gov/ksc.

CHARGING DOCUMENTS

All charging documents filed for crimes to be sentenced under the KSGA system should allege facts sufficient to classify the crime severity level of the offense on the guidelines grid. If a particular felony crime is sub-classified into different versions of the same offense that have been assigned different severity levels, the charge should include facts sufficient to establish the required elements of the version of the offense carrying the severity level reflected in the charging document. See K.S.A. 2010 Supp. 22-3201 for the requisites of a complaint, indictment or information.

FINGERPRINTING; SENTENCING GUIDELINES IMPLICATIONS

Municipal Court Duties

The court is required to ensure that fingerprints are taken upon conviction for a city ordinance violation comparable to a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2011 Supp. 21-5412 [formerly K.S.A. 21-3408]. See K.S.A. 2010 Supp. 12-4517(a).

Law Enforcement Duties

Every sheriff, police department, or countywide law enforcement agency in the state is required to make two sets of fingerprint impressions of a person who is arrested if the person:

- is wanted for the commission of a felony. On or after July 1, 1993, fingerprints shall also be taken if the person is wanted for the commission of a class A or B misdemeanor or a violation of a county resolution which would be the equivalent of a class A or B misdemeanor as defined by a Kansas criminal statute, or for an assault as defined in K.S.A. 2011 Supp. 21-5412 [formerly K.S.A. 21-3408];
- is believed to be a fugitive from justice;

- may be in the possession at the time of arrest of any goods or property reasonably believed to have been stolen by the person;
- is in possession of firearms or other concealed weapons, burglary tools, high explosives or other appliances believed to be used solely for criminal purposes;
- is wanted for any offense which involves sexual conduct prohibited by law or for violation of the uniform controlled substances act; or
- is suspected of being or known to be a habitual criminal or violator of the intoxicating liquor law.

See K.S.A. 2010 Supp. 21-2501(a).

County/District Court Duties

The court shall ensure, upon the accused person's first appearance, or in any event, before final disposition of a felony or a class A or B misdemeanor or a violation of a county resolution which prohibits an act which is prohibited by a class A or B misdemeanor, the offender has been processed, fingerprinted, and palm printed. See K.S.A. 2010 Supp. 21-2501(b).

Juvenile Court Duties

Fingerprints shall not be taken of any juvenile who is taken into custody for any purpose, with the following exceptions:

- Fingerprints of a juvenile may be taken if authorized by the court having jurisdiction;
- After adjudication, fingerprints shall be taken of all juvenile offenders adjudicated due to commission of an offense which if committed by an adult would constitute the commission of a felony or any of the following misdemeanor violations:
 - K.S.A. 2011 Supp. 21-5411 [formerly K.S.A. 21-3424], criminal restraint K.S.A. 2011 Supp. 21-5511 [formerly K.S.A. 21-3507], adultery Subsection (b)(1) of K.S.A. 2011 Supp. 21-5513 [formerly K.S.A. 21-3508], lewd and lascivious behavior,
 - Subsection (b)(1)(A) of K.S.A. 2011 Supp. 21-6420 [formerly K.S.A. 21-3513], promoting prostitution, when the prostitute is 16 or more years of age,
 - K.S.A. 2011 Supp. 21-5505 [formerly K.S.A. 21-3517], sexual battery, and
 - an attempt, conspiracy or criminal solicitation, as defined in K.S.A. 2011 Supp. 21-5301, 21-5302 or 21-5303 [formerly K.S.A. 2010 Supp. 21-3301, 21-3302 or 21-3303], to commit a violation of any of the offenses specified in this subsection;
- Fingerprints of a juvenile may be taken under K.S.A. 2010 Supp. 21-2501, if the juvenile has been prosecuted as an adult pursuant to K.S.A. 2010 Supp. 38-2347; and
- Fingerprints may be taken of any juvenile admitted to a juvenile correctional facility.

See K.S.A. 2011 Supp. 38-2313.

OFFICIAL RECORDS

All Kansas law enforcement agencies shall maintain a permanent record, on forms approved by the Attorney General, of all felony and misdemeanor offenses reported or known to have been committed within their respective jurisdictions. K.S.A. 21-2501a(a). All law enforcement agencies must file a report of such offenses, on a form approved by the Attorney General, with the Kansas Bureau of Investigation (KBI) within 72 hours after such offense is reported, or known to have been committed. K.S.A. 21-2501a(b). All law enforcement agencies must report within 30 days, on forms approved by the Attorney General, any methamphetamine laboratory seizures or dump sites and any

theft or attempted theft of anhydrous ammonia that occurs in such agency's jurisdiction. K.S.A. 21-2501a(c).

PLEA AGREEMENT RULES

Generally the parties may move to dismiss any charges or counts pursuant to a plea bargain. The parties may stipulate to a particular sentence within the grid block classification appropriate for an offender given his or her crime of conviction and complete criminal history score. The parties may agree to recommend a sentence outside the presumptive range on the grid when departure factors exist. These factors must be stated on the record. The State may agree to file or not to file specific charges or counts. See K.S.A. 2011 Supp. 21-6812 [formerly K.S.A. 2010 Supp. 21-4713].

A plea agreement involving the deliberate deletion of an offender's prior convictions from criminal history or an agreement by the prosecution to disregard any prior convictions of the offender which will elevate the severity level of the offense or count in the offender's criminal history is impermissible. See K.S.A. 2011 Supp. 21-6812(f) [formerly K.S.A. 2010 Supp. 21-4713(f) and 21-4708(b)(2)].

At the time of acceptance of a plea of guilty or *nolo contendere*, the sentencing court must inform the offender of the specific severity level of the crime and the range of penalties associated with that severity level. See K.S.A. 2010 Supp. 22-3210. The sentencing court is not bound to follow an agreed sentencing recommendation. It has the discretion to impose up to the maximum sentence in the applicable grid block. See K.S.A. 21-6804(e)(1) [formerly K.S.A. 21-4704(e)(1)] and K.S.A. 21-6805(c)(1) [formerly K.S.A. 21-4705(c)(1)], and, e.g., *State v. Johnson*, 286 Kan. 824, 190 P.3d 207 (2008).

Once the guilty or *nolo contendere* plea has been accepted by the court, the severity level of the crime cannot be elevated for sentencing purposes due to the subsequent discovery of prior convictions which would have raised the severity level of the crime; instead the prior convictions will be used in the determination of the criminal history category. See K.S.A. 2011 Supp. 21-6807(b)(4) [formerly K.S.A. 21-4707(b)(4)].

However, for a charge of Driving Under the Influence (DUI), no plea bargaining agreement shall be entered into nor approved for the purpose of permitting the person charged to avoid the mandatory penalties established by the DUI statute or a similar ordinance. A diversion agreement shall not constitute plea bargaining. See K.S.A. 2011 Supp. 8-1567(n).

DIVERSIONS

A diversion agreement cannot be entered into for a DUI violation if: the defendant has previously participated in a diversion for DUI; has previously been convicted of or pleaded *nolo contendere* to a DUI; or, during the time of the DUI the defendant was involved in a motor vehicle accident or collision resulting in personal injury or death. K.S.A. 2011 Supp. 22-2908(b)(1).

A diversion agreement cannot be entered into for a class A or B felony or for crimes committed on or after July 1, 1993, constituting an off-grid crime, a nondrug severity level 1, 2 or 3 felony, or a drug severity level 1 or 2 felony. K.S.A. 2011 Supp. 22-2908(b)(2).

A county or district attorney may enter into a diversion agreement in lieu of criminal proceedings on a complaint for violation of Wildlife and Parks laws (Article 10 of Chapter 32) if the diversion carries the same penalties as the conviction for the corresponding violation. If the defendant has previously participated in one or more diversions then each subsequent diversion would carry the same penalties as the conviction for the corresponding violation. See K.S.A. 2011 Supp. 22-2908(c).

DEFERRING SENTENCE PENDING MENTAL EXAMINATION

A mental health examination may be completed on the offender as part of the presentence investigation report. The sentencing court may commit the offender to a state security hospital or suitable local mental health facility for such examination. The maximum duration of commitment that can be imposed for the examination is 120 days. See K.S.A. 2011 Supp. 22-3429.

DRUG ABUSE ASSESSMENT

As part of the presentence investigation K.S.A. 21-6813, [formerly K.S.A. 21-4714], offenders who meet the requirements of K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729(a)] (2003 Senate Bill 123) shall be subject to a drug abuse assessment which shall include a clinical interview with a mental health professional as defined in subsection (g) of K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729] and a recommendation concerning drug abuse treatment for the offender, and a criminal risk-need assessment, unless otherwise specifically ordered by the court. The criminal risk-need assessment shall assign a high or low risk status to the offender. K.S.A. 2011 Supp. 21-6824(b) [formerly K.S.A. 2010 Supp. 21-4729(b)].

The presentence criminal risk-need assessment shall be conducted by a court services officer or a community corrections officer. The presentence drug abuse treatment program placement assessment shall be conducted by a drug abuse treatment program certified by the secretary of corrections to provide assessment and treatment services. See K.S.A. 2011 Supp. 75-52,144(b).

The risk and needs assessment and any drug abuse assessment are only available to the parties, the sentencing judge, the department of corrections and if requested, the Kansas Sentencing Commission. See K.S.A. 2011 Supp. 21-6813(c) [formerly K.S.A. 2010 Supp. 21-4714(c)]. See K.S.A. 21-6813 [formerly K.S.A. 21-4714] which governs the contents of the PSI report.

CHAPTER III: CRIME SEVERITY LEVELS

GENERAL RULES FOR DETERMINING SEVERITY LEVELS

The severity levels range from severity level 1 to severity level 10 on the nondrug grid. Level 1 is used to categorize the most severe crimes and level 10 is used to categorize the least severe crimes. Crimes listed within each level are considered relatively equal in severity. K.S.A. 2011 Supp. 21-6807(a), [formerly K.S.A. 21-4707(a)].

The crime severity scale contained in the sentencing guidelines grid for drug crimes consists of four levels of crimes. Crimes listed within each level are also considered relatively equal in severity. Level 1 is used to categorize the most severe crimes and level 4 is used to categorize the least severe crimes. K.S.A. 2011 Supp. 21-6808(a), [formerly K.S.A. 2010 Supp. 21-4708(a)].

The following provisions shall be applicable with regard to ranking offenses according to the crime severity scale:

- The sentencing court will designate the appropriate severity level if it is not provided by statute. When considering an unranked offense in relation to the crime severity scale, the sentencing court should refer to comparable offenses on the crime severity scale. K.S.A. 2011 Supp. 21-6807(c)(1), [formerly K.S.A. 21-4707(c)(1)].
- Except for off-grid felony crimes, which are classified as person felonies, any felony crimes omitted from the crime severity scale shall be considered nonperson felonies. K.S.A. 2011 Supp. 21-6807(c)(2), [formerly K.S.A. 21-4707(c)(2)].
- All unclassified felonies shall be scored as level 10 nonperson crimes. K.S.A. 2011 Supp. 21-6807(c)(3), [formerly K.S.A. 21-4707(c)(3)].

All felony crimes, with the exception of off-grid crimes, felony driving under the influence (K.S.A. 2011 Supp 8-1567), felony domestic battery K.S.A. 2011 Supp. 21-5414, [formerly K.S.A. 2010 Supp 21-3412a], and animal cruelty K.S.A. 2011 Supp. 21-6412 and 21-6416, [formerly K.S.A. 2010 Supp 21-4310 and K.S.A. 21-4318] should be categorized in one or more of the crime severity levels. The severity level designation of each felony crime is included in the statutory definition of the crime. Some crimes include a broad range of conduct. In such circumstances, there may be a different severity level designated for violations of different subsections of the statute. All felonies are listed in Appendix B of this Manual alphabetically by description. Listings on-line at www.Kansas.gov/ksc are also in statute and severity level order.

ANTICIPATORY CRIMES

Anticipatory crimes, including attempt, conspiracy, and solicitation, are treated differently for off-grid felonies, offenses on the nondrug grid and drug grid, and misdemeanor offenses.

Attempt K.S.A. 2011 Supp. 21-5301, [formerly K.S.A. 2010 Supp. 21-3301]

An attempt to commit an off-grid felony shall be ranked at nondrug severity level 1, with the following exceptions:

- An attempt to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
 - Aggravated human trafficking, as defined in subsection (b) of K.S.A. 2011 Supp. 21-5426 [formerly K.S.A. 21-3447];
 - Rape, as defined in subsection (a)(3) of K.S.A. 2011 Supp. 21-5503 [formerly K.S.A. 21-3502];
 - Aggravated indecent liberties with a child, as defined in subsection (b)(3) of K.S.A. 2011 Supp. 21-5506 [formerly K.S.A. 21-3504];
 - Aggravated criminal sodomy, as defined in subsection (b)(1) or (b)(2) of K.S.A. 2011 Supp. 21-5504 [formerly K.S.A. 21-3506];
 - Promoting prostitution, as defined in K.S.A. 2011 Supp. 21-6420 [formerly K.S.A. 21-3513];
 - Sexual exploitation of a child, as defined in subsection (a)(1) or (a)(4) of K.S.A. 2011 Supp. 21-5510 [formerly K.S.A. 21-3516];
- The reduction of severity level does not apply to an attempt to commit terrorism as defined in K.S.A. 2011 Supp. 21-5421 [formerly K.S.A. 21-3449] or, illegal use of weapons of mass destruction as defined in K.S.A. 2011 Supp. 21-5422 [formerly K.S.A. 21-3450]; The reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender. K.S.A. 2011 Supp. 21-6627(e) [formerly K.S.A. 2010 Supp. 21-4643].

An attempt to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for an attempt to commit a nondrug felony shall be a severity level 10.

An attempt to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months with the following exception:

- The reduction of a sentence on the drug grid by six months for an attempted crime does not apply in cases involving an attempt to manufacture a controlled substance under K.S.A. 2011 Supp. 21-5703 [formerly K.S.A. 2010 Supp. 21-36a03].

An attempt to commit a class A person misdemeanor is a class B person misdemeanor. An attempt to commit a class A nonperson misdemeanor is a class B nonperson misdemeanor. An attempt to commit a class B or C misdemeanor is a class C misdemeanor.

Conspiracy K.S.A. 2011 Supp. 21-5302, [formerly K.S.A. 2010 Supp. 21-3302]

Conspiracy to commit an off-grid felony shall be ranked at nondrug severity level 2, with the following exceptions:

- Conspiracy to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
 - Aggravated human trafficking, as defined in subsection (b) of K.S.A. 2011 Supp. 21-5426 [formerly K.S.A. 21-3447];
 - Rape, as defined in subsection (a)(3) of K.S.A. 2011 Supp. 21-5503 [formerly K.S.A. 21-3502];
 - Aggravated indecent liberties with a child, as defined in subsection (b)(3) of K.S.A. 2011 Supp. 21-5506 [formerly K.S.A. 21-3504];
 - Aggravated criminal sodomy, as defined in subsection (b)(1) or (b)(2) of K.S.A. 2011 Supp. 21-5504 [formerly K.S.A. 21-3506];
 - Promoting prostitution, as defined in K.S.A. 2011 Supp. 21-6420 [formerly K.S.A. 21-3513];
 - Sexual exploitation of a child, as defined in subsection (a)(1) or (a)(4) of K.S.A. 2011 Supp. 21-5510 [formerly K.S.A. 21-3516];
- The reduction of severity level does not apply to conspiracy to commit terrorism as defined in K.S.A. 2011 Supp. 21-5421 [formerly K.S.A. 21-3449] or, illegal use of weapons of mass destruction as defined in K.S.A. 2011 Supp. 21-5422 [formerly K.S.A. 21-3450];
- The reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender. K.S.A. 2011 Supp. 21-6627(e) [formerly K.S.A. 2010 Supp. 21-4643].

Conspiracy to commit any other nondrug felony shall be ranked on the nondrug scale at two severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for conspiracy to commit a nondrug felony shall be a severity level 10.

Conspiracy to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.

Conspiracy to commit a misdemeanor is a class C misdemeanor.

Solicitation K.S.A. 2011 Supp. 21-5303, [formerly K.S.A. 2010 Supp. 21-3303]

Criminal solicitation to commit an off-grid felony shall be ranked at nondrug severity level 3, with the following exceptions:

- Criminal solicitation to commit the following offenses, when the offender is 18 years of age or older and the victim is less than 14 years of age, shall remain off-grid felonies (i.e. the reduction of severity level shall not apply):
 - Aggravated human trafficking, as defined in subsection (b) of K.S.A. 2011 Supp. 21-5426 [formerly K.S.A. 21-3447];
 - Rape, as defined in subsection (a)(3) of K.S.A. 2011 Supp. 21-5503 [formerly K.S.A. 21-3502];
 - Aggravated indecent liberties with a child, as defined in subsection (b)(3) of K.S.A. 2011 Supp. 21-5506 [formerly K.S.A. 21-3504];
 - Aggravated criminal sodomy, as defined in subsection (b)(1) or (b)(2) of K.S.A. 2011 Supp. 21-5504 [formerly K.S.A. 21-3506];

- Promoting prostitution, as defined in K.S.A. 2011 Supp. 21-6420 [formerly K.S.A. 21-3513];
- Sexual exploitation of a child, as defined in subsection (a)(1) or (a)(4) of K.S.A. 2011 Supp. 21-5510 [formerly K.S.A. 21-3516];
- The reduction of severity level does not apply to criminal solicitation to commit terrorism as defined in K.S.A. 2011 Supp. 21-5421 [formerly K.S.A. 21-3449] or, illegal use of weapons of mass destruction as defined in K.S.A. 2011 Supp. 21-5422 [formerly K.S.A. 21-3450];
- The reduction of severity level does not apply if the offender is being sentenced as an aggravated habitual sex offender. K.S.A. 2011 Supp. 21-6627(e) [formerly K.S.A. 2010 Supp. 21-4643].

Criminal solicitation to commit any other nondrug felony shall be ranked on the nondrug scale at three (3) severity levels below the appropriate level for the underlying or completed crime. The lowest severity level for solicitation to commit a nondrug felony shall be a severity level 10.

Criminal solicitation to commit a felony that prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.

CHAPTER IV: CRIMINAL HISTORY

CRIMINAL HISTORY RULES

The horizontal axis or top of the grid represents the criminal history categories. Nine categories are used to designate prior criminal history. Category A is used to categorize offenders having three (3) or more prior felony convictions designated as person crimes. Category I is used to categorize offenders having either no criminal record or a single conviction or juvenile adjudication for a misdemeanor. The criminal history categories classify an offender's criminal history in a quantitative as well as a qualitative manner. The categories between A and I reflect cumulative criminal history with an emphasis on whether prior convictions were for person crimes or nonperson crimes. Generally, person crimes are weighed more heavily than nonperson crimes. Within limits, prior convictions for person crimes will result in a harsher sentence for the current crime of conviction. See K.S.A. 2011 Supp. 21-6809 [formerly K.S.A. 21-4709].

The criminal history scale is represented in an abbreviated form on the horizontal axis of the nondrug grid and the drug grid. The relative severity of each criminal history category decreases from left to right on the grids, with Criminal History Category A being the most serious classification and Criminal History Category I being the least serious classification.

Criminal History Category	Descriptive Criminal History
A	The offender's criminal history includes three or more adult convictions or juvenile adjudications, in any combination, for person felonies.
B	The offender's criminal history includes two adult convictions or juvenile adjudications, in any combination, for person felonies.
C	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, and one or more adult convictions or juvenile adjudications for nonperson felonies.
D	The offender's criminal history includes one adult conviction or juvenile adjudication for a person felony, but no adult conviction or juvenile adjudication for a nonperson felony.
E	The offender's criminal history includes three or more adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
F	The offender's criminal history includes two adult convictions or juvenile adjudications for nonperson felonies, but no adult conviction or juvenile adjudication for a person felony.
G	The offender's criminal history includes one adult conviction or juvenile adjudication for a nonperson felony, but no adult conviction or juvenile adjudication for a person felony.
H	The offender's criminal history includes two or more adult convictions or juvenile adjudications for nonperson and/or select misdemeanors, and no more than two adult convictions or juvenile adjudications for person misdemeanors, but no adult conviction or juvenile adjudication for either a person or nonperson felony.
I	The offender's criminal history includes no prior record, or one adult conviction or juvenile adjudication for a person, nonperson, or a select misdemeanor, but no adult conviction or juvenile adjudication for either a person or a nonperson felony.

Criminal History Categories are based upon the following types of prior convictions and/or adjudications:

- person felonies;
- nonperson felonies;
- person misdemeanors and comparable municipal ordinance and county resolution violations;
- class A nonperson misdemeanors and comparable municipal ordinance and county resolution violations; and
- class B nonperson select misdemeanors and comparable municipal ordinance and county resolution violations.

The “person” designation refers to crimes that inflict, or could inflict, physical or emotional harm to another person. Examples of person crimes are robbery, rape, aggravated arson, and battery. The “nonperson” designation refers generally to crimes committed that inflict, or could inflict, damage to property. Nonperson crimes also include offenses such as drug crimes, failure to appear, suspended driver’s license, perjury, etc. The “select” designation refers to convictions for weapons violations.

All convictions and adjudications, except as otherwise provided, should be included in the offender’s criminal history. Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction. An offender’s **criminal history classification** is determined using the following rules pursuant to K.S.A. 2011 Supp. 21-6810 [formerly K.S.A. 2010 Supp. 21-4710]:

- Only verified prior convictions will be considered and scored. K.S.A. 2011 Supp. 21-6810 (d)(1) [formerly K.S.A. 2010 Supp. 21-4710(d)(1)].
 - **A prior conviction** is any conviction, other than another count in the current case which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, which occurred prior to imposition of sentence in the current case, regardless of whether the crime that was the subject of the prior conviction was committed before or after the commission of the current crime of conviction. K.S.A. 2011 Supp. 21-6810(a) [formerly K.S.A. 2010 Supp. 21-4710(a)].
 - The classification of a prior conviction will be made in accordance with the law applicable at the time of the conviction. See K.S.A. 2011 Supp. 21-6810(d)(9) and 21-6802(c) [formerly K.S.A. 2010 Supp. 21-4710(d)(9) and 21-4723].
 - Prior convictions or adjudications, whether sentenced concurrently or consecutively, will each be counted separately. K.S.A. 2011 Supp. 21-6810(c) [formerly K.S.A. 2010 Supp. 21-4710(c)].
- All prior adult felony convictions, including expungement will be considered and scored. K.S.A. 2011 Supp. 21-6810(d)(2) [formerly K.S.A. 2010 Supp. 21-4710(d)(2)].
- There will be no decay factor applicable to adult convictions. K.S.A. 2011 Supp. 21-6810(d)(3) [formerly K.S.A. 2010 Supp. 21-4710(d)(3)].
- All person misdemeanor convictions, class A nonperson misdemeanor convictions, class B select nonperson misdemeanors, and comparable municipal ordinance and county resolution violations shall be considered and scored. K.S.A. 2011 Supp. 21-6810(d)(5) [formerly K.S.A. 2010 Supp. 21-4710(d)(7)]. Note, however, that, for 6th amendment right to counsel constitutional reasons, an offender can properly challenge the inclusion of an uncounseled misdemeanor conviction obtained in violation of the offender’s right to counsel. See, especially, the analysis and citations in *State v. Neal*, 258 P.3d 365 (2011).

- Unless otherwise provided by law, unclassified felonies and misdemeanors shall be considered and scored as nonperson crimes for the purpose of determining criminal history. K.S.A. 2011 Supp. 21-6810(d)(6) [formerly K.S.A. 2010 Supp. 21-4710(d)(8)].
- Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction. K.S.A. 2011 Supp. 21-6810(d)(7) [formerly K.S.A. 2010 Supp. 21-4710(d)(9)].
- Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. K.S.A. 2011 Supp. 21-6810(d)(8) [formerly K.S.A. 2010 Supp. 21-4710(d)(10)].
- If a prior conviction of any crime operates to enhance the severity level for the current crime of conviction, elevate the current crime of conviction from a misdemeanor to a felony, or constitute elements of the present crime of conviction, that prior conviction cannot be counted in the offender's criminal history. Unless otherwise provided, all other prior convictions will be considered and scored. However, when sentencing an offender for an offense that occurred before April 18, 2010, a prior conviction that enhances the penalty for the current offense cannot be included in the criminal history. See the forgery sentencing case *State v. Gilley*, 290 Kan. 31 (2010), and the subsequent amendment of K.S.A. 21-4710(d)(11) that deleted the phrase "or applicable penalties" from the statute. Also see K.S.A. 2011 Supp. 21-6810(d)(9) [formerly K.S.A. 2010 Supp. 21-4710(d)(11)]. A prior conviction that creates the need for registration as a sex offender is an element of the offense of failure to register and cannot be counted in determining the criminal history score on conviction of failure to register. *State v. Pottoroff*, 32 Kan. App. 2d 1161 (2004).

Juvenile Adjudications

Except as otherwise provided, a juvenile adjudication which would have been a nonperson class D or class E felony if committed before July 1, 1993, or a nondrug level 6, 7, 8, 9 or 10, or drug level 4, nonperson felony if committed on or after July 1, 1993, or a misdemeanor if committed by an adult, will decay if the current crime of conviction is committed after the offender reaches the age of 25. K.S.A. 2011 Supp. 21-6810(d)(4) [formerly K.S.A. 2010 Supp. 21-4710(d)(4)].

For convictions of crimes committed before July 1, 1993, a juvenile adjudication that would constitute a class A, B, or C felony, if committed by an adult, will not decay. For convictions of crimes committed on or after July 1, 1993, a juvenile adjudication which would constitute an off-grid felony, a nondrug severity level 1, 2, 3, 4, or 5 felony, or a drug severity level 1, 2, or 3 felony, if committed by an adult, will not decay. K.S.A. 2011 Supp. 21-6810(d)(3)(C) and (d)(3)(D) [formerly K.S.A. 2010 Supp. 21-4710(d)(5)]. All juvenile adjudications that would constitute a person felony will not decay. K.S.A. 2011 Supp. 21-6810(d)(3)(B) [formerly K.S.A. 2010 Supp. 21-4710(d)(6)].

Diversions

Diversions are not "convictions" and are therefore not included in criminal history, with the exception of the felony DUI and the Involuntary Manslaughter provisions.

- The felony DUI exception provides that, for the purpose of determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under the DUI provisions, a "conviction" includes entering into a diversion agreement in lieu of further criminal proceedings on a DUI violation. See K.S.A. 2011 Supp 8-1567(j). A juvenile diversion for DUI counts as a prior DUI conviction for the purpose of elevating a DUI crime based on the number of prior offenses. *State v. Bishop*, 44 Kan. App. 2d 739, 240 P. 3d 614 (2010).

- For an offense occurring on or after July 1, 1996, if the current crime of conviction is for a violation of K.S.A. 2011 Supp. 21-5405(a)(3) [formerly K.S.A. 21-3442], Involuntary Manslaughter while driving under the influence of drugs or alcohol, each prior adult conviction, diversion in lieu of criminal prosecution, or juvenile adjudication for a DUI violation shall count as one person felony for criminal history purposes. K.S.A. 2011 Supp. 21-6811(c)(2) [formerly K.S.A. 2005 Supp. 21-4711(c)(2)].

Information Not Relevant to Criminal History

The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do **not** include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
- **Adults:** Do **not** include traffic infractions, diversions, contacts with law enforcement, or arrests not resulting in conviction.

Special Applications in Determining Criminal History K.S.A. 2011 Supp. 21-6811 [formerly K.S.A. 21-4711]

The following special rules are applicable to the determination of the offender's criminal history category:

Person Misdemeanors

Every three prior adult convictions or juvenile adjudications of class A and class B person misdemeanors in the offender's criminal history, or any combination thereof, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2011 Supp. 21-6811(a) [formerly K.S.A. 21-4711(a)]. Convictions or adjudications for misdemeanor person crimes may place an offender in a higher criminal history category classification. For example, an offender who has five misdemeanor batteries will fall into criminal history category D, which reflects one prior person felony conviction, rather than criminal history category H, which reflects multiple misdemeanor convictions.

In addition, every three prior adult convictions or adjudications of misdemeanor assault, as defined in K.S.A. 21-3408, prior to its repeal, or subsection (a) of K.S.A. 2011 Supp. 21-5412, that occurred within a period of three years commencing immediately prior to the date of conviction for the current crime, shall be rated as one adult conviction or one juvenile adjudication of a person felony for criminal history purposes. K.S.A. 2011 Supp. 21-6811(a) [formerly K.S.A. 21-4711(a)].

Select Class B Nonperson Misdemeanors

A prior conviction for a violation of: criminal possession of firearms by a person who is both addicted to and an unlawful user of a controlled substance as defined in subsection (a)(1) of K.S.A. 2010 Supp. 21-4204, prior to its repeal, or subsection (a)(10) of K.S.A. 2011 Supp. 21-6301; possession of a firearm on school grounds as defined in subsection (a)(5) of K.S.A. 2010 Supp. 21-4204, prior to its repeal, or subsection (a)(11) of K.S.A. 2011 Supp. 21-6301; or *unlawful possession of a firearm as in effect on June 30, 2005, and as defined in K.S.A. 2010 Supp. 21-4218, prior to its repeal* (possession of a firearm on the grounds of or in the state capitol building), shall be scored as a select class B nonperson misdemeanor conviction or adjudication and shall not be scored as a person misdemeanor for criminal history purposes. K.S.A. 2011 Supp. 21-3811(b) [formerly K.S.A. 21-4711(b)].

Involuntary Manslaughter and DUI

If the current crime of conviction is involuntary manslaughter while driving under the influence of alcohol or drugs, each prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for a violation of K.S.A. 2011 Supp. 8-1567, or a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits acts described in K.S.A. 2011 Supp. 8-1567, shall count as one person felony for criminal history purposes. K.S.A. 2011 Supp. 21-5405(a)(3) and 21-6811(c)(2) [formerly K.S.A. 21-3442 and 21-4711(c)(2)].

Burglary

Prior adult convictions and juvenile adjudications for burglary will be scored for criminal history purposes as follows:

- As a prior person felony if the prior conviction or adjudication was classified as a burglary to a dwelling, as described in subsection (a) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(1) of K.S.A. 2011 Supp. 21-5807. K.S.A. 2011 Supp. 21-6811(d)(1) [formerly K.S.A. 21-4711(d)(1)].
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a building other than a dwelling, as described in subsection (b) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(2) of K.S.A. 2011 Supp. 21-5807. K.S.A. 2011 Supp. 21-6811(d)(2) [formerly K.S.A. 21-4711(d)(2)].
- As a prior nonperson felony if the prior conviction or adjudication was classified as a burglary to a motor vehicle or other means of conveyance of persons or property, as described in subsection (c) of K.S.A. 21-3715, prior to its repeal, or subsection (a)(3) of K.S.A. 2011 Supp. 21-5807. K.S.A. 2011 Supp. 21-6811(d)(2) [formerly K.S.A. 21-4711(d)(2)].

The facts required to classify prior adult convictions or juvenile adjudications for burglary, must be established by the State by a preponderance of the evidence. See K.S.A. 2011 Supp. 21-6811(d) [formerly K.S.A. 21-4711(d)].

Out-of-State Convictions

Prior out-of-state convictions and juvenile adjudications will also be used to determine the appropriate criminal history category classification. Out-of-state crimes will be classified as either felonies or misdemeanors according to the law of the convicting jurisdiction. K.S.A. 2011 Supp. 21-6811(e) [formerly K.S.A. 21-4711(e)]. For example, if a crime is a felony in another state, it will be counted as a felony for criminal history purposes regardless of the classification of the crime under Kansas law.

However, the plain language of K.S.A. 2011 Supp. 21-6811(e) [formerly K.S.A. 21-4711(e)] requires the sentencing court to consider whether Kansas has an offense comparable to the out-of-state crime when determining whether an out-of-state conviction should be classified as a person felony. See *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003); *State v. Hernandez*, 24 Kan. App. 2d 285, 287, 944 P.2d 188, *rev. denied* 263 Kan. 888 (1997). A comparable offense need not contain elements identical to those of the out-of-state crime, *Vandervort*, 276 Kan. at 179, but must be similar in nature and cover a similar type of criminal conduct. *State v. Schultz*, 22 Kan. App. 2d 60, 62, 911 P.2d 1119 (1996). If Kansas has no comparable offense, the sentencing court must classify the out-of-state conviction as a nonperson felony. K.S.A. 2011 Supp. 21-6811(e) [formerly K.S.A. 21-4711(e)]. Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal, or military courts are considered out-of-state convictions or adjudications. K.S.A. 2011 Supp. 21-6811(e) [formerly K.S.A. 21-4711(e)]

While both California's offense of DUI causing bodily injury, Cal. Vehicle Code § 23153(b) (West 2000), and Kansas' aggravated battery statute, K.S.A. 21-3414, prior to its repeal, contain 2 provisions regarding bodily injury, the offenses do not cover similar types of conduct and are not comparable offenses. California's offense of DUI causing bodily injury, unlike Kansas' aggravated battery statute, includes a specific causation requirement, *i.e.*, that the defendant drive while legally intoxicated and concurrently neglect to perform a duty required by law, which failure results in injury to another person. Further, the Kansas aggravated battery statute, unlike California's offense of DUI causing bodily injury, requires reckless or intentional conduct. *State v. Barajas*, 43 Kan. App. 2d No. 3 639 (2010).

The facts required to classify out-of-state adult convictions and juvenile adjudications such that they are considered in the determination of the offender's criminal history score must be established by the State by a preponderance of the evidence. K.S.A. 2011 Supp. 21-6811(e) [formerly K.S.A. 21-4711(e)].

When military convictions are at issue, "a specification is the allegation of a distinct offense in support of the general charge, and is comparable to a count in a civilian indictment." *Hunsaker v. Ridgely*, 85 F. Supp. 757, 758 (S.D.Me. 1949), cited in *State v. Swilley*, 25 Kan. App. 2d 492 (1998).

The Legislature intended the sentencing court to compare a prior conviction to the most comparable Kansas offense to make a felony or misdemeanor determination when such conviction occurred in a jurisdiction that does not distinguish between felonies and misdemeanors, such as a military proceeding. *State v. Hernandez*, 24 Kan. App. 2d 285, 286-289, 944 P.2d 188, 192-193 (1997).

Juvenile Records

Subject to the decay rules in K.S.A. 2011 Supp. 21-6810(d)(3) and (d)(4) [formerly K.S.A. 2010 Supp. 21-4710(d)(4), (d)(5), and (d)(6)], prior juvenile adjudications will be treated in the same manner as adult convictions when determining criminal history classification. Out-of-state juvenile adjudications will be treated as juvenile adjudications in Kansas for criminal history purposes. K.S.A. 2011 Supp. 21-6811(f) [formerly K.S.A. 21-4711(f)].

The parties are entitled access to the juvenile files and records of the offender in order to discover or verify criminal history. K.S.A. 2011 Supp. 22-3212(i).

Anticipatory Crimes

A prior conviction for an attempt, conspiracy, or solicitation to commit a crime will be treated as a person or nonperson crime in accordance with the designation of the underlying crime. K.S.A. 2011 Supp. 21-6811(g) [formerly K.S.A. 21-4711(g)].

Drug Crimes

Drug crimes are designated as nonperson crimes for criminal history scoring. K.S.A. 2011 Supp. 21-6811(h) [formerly K.S.A. 21-4711(h)].

Leaving the Scene

If the current crime of conviction is leaving the scene of an accident, the level of that offense is determined under K.S.A. 8-1602(b). The severity level of the offense is based generally on the degree of harm from the accident. If the offender's criminal history includes a conviction of any of the following, then each such conviction for an act committed on or after July 1, 2011, shall count as a person felony for criminal history purposes:

- 8-235, driving a vehicle without a license;
- 8-262, driving while license is canceled, suspended, or revoked;
- 8-287, driving while one's privileges are revoked for being a habitual violator;
- 8-291, violating restrictions on driver's license or permit;
- 8-1566, reckless driving;
- 8-1567, driving under the influence of alcohol or drugs;
- 8-1568, fleeing or attempting to elude a police officer;
- 8-1602, leaving the scene of an accident resulting in injury, great bodily harm, or death;
- 8-1605, failing to contact the owner of vehicle following an accident causing damage to unattended property;
- 40-3104, failing to obtain motor vehicle liability insurance coverage;
- Subsection (a)(3) of K.S.A. 2011 Supp. 21-5405 [formerly K.S.A. 21-3442], involuntary manslaughter committed while DUI; and
- K.S.A. 2011 Supp. 21-5406 [formerly K.S.A. 21-3405], vehicular homicide
- Or a violation of a city ordinance or law of another state which would also constitute a violation of such sections.

PROOF OF CRIMINAL HISTORY

Unless disputed by the offender, the criminal history worksheet serves as adequate verification of the offender's criminal history. If the offender disputes any aspect of the criminal history worksheet portion of the presentence investigation report as prepared by the field services officer, the offender shall immediately notify the district attorney and the court with a written notice specifying the exact nature of the alleged error. The State will then have the burden of producing further evidence to satisfy its burden of proof regarding any disputed part, or parts, of the criminal history. The sentencing judge must allow the state reasonable time to produce such evidence to establish the disputed portion of the criminal history by a preponderance of the evidence. If the offender later challenges such offender's criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of evidence. K.S.A. 2011 Supp. 21-6814 [formerly K.S.A. 2010 Supp. 21-4715].

CHAPTER V: PRESENTENCE INVESTIGATION REPORTS

REQUIREMENTS

The sentencing court is required to order a Presentence Investigation Report (PSI) to be prepared by a court services officer as soon as possible after every felony conviction involving crimes committed on or after July 1, 1993, including all unclassified felonies. K.S.A. 2011 Supp. 21-6813(a) [formerly K.S.A. 2010 Supp. 21-4714(a)]. The KSGA establishes a uniform format for the PSI in all felony cases. This format must be used to provide consistency statewide. The PSI includes a face sheet, a Criminal History Worksheet, and limited topic sections covering the current offense: official version, defendant's version, victim(s) statement(s), drug, alcohol, and psychological evaluations of the defendant, restitution amounts, and the field services officer's recommendations regarding conditions of probation where appropriate. See K.S.A. 2011 Supp. 21-6813 [formerly K.S.A. 2010 Supp. 21-4714]. A copy of the PSI, including the Criminal History Worksheet, and the Journal Entry of Judgment, all attached together, must be sent to the Kansas Sentencing Commission for each felony case within thirty days after sentencing. K.S.A. 2011 Supp. 22-3439(a).

Each PSI prepared for an offender to be sentenced for one or more felonies committed on or after July 1, 1993, shall be limited to the following information:

- A summary of the factual circumstances of the crime or crimes of conviction.
- If the defendant desires to provide one, a summary of the defendant's version of the crime.
- When there is an identifiable victim, a victim report. To the extent possible, the report shall include a complete listing of restitution for damages suffered by the victim.
- An appropriate classification of each crime of conviction on the crime severity scale.
- A listing of prior adult convictions or juvenile adjudications for felony or misdemeanor crimes or violations of county resolutions or city ordinances comparable to any misdemeanor defined by state law. Such listing shall include an assessment of the appropriate classification of the criminal history on the criminal history scale, the source of information regarding each listed prior conviction and copies of any available source of journal entries or other documents through which the listed convictions may be verified, including any prior criminal history worksheets.
- The following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.
 - **Juveniles:** Do not include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
 - **Adults:** Do not include traffic infractions, diversions contacts with law enforcement, or arrests not resulting in conviction.
- Proposed grid block classification for each crime, or crimes of conviction and the presumptive sentence for each crime, or crimes of conviction.
- If the proposed grid block classification is a grid block that presumes imprisonment, the presumptive prison term range and the presumptive duration of postrelease supervision as it relates to the crime severity.
- If the proposed grid block classification does not presume prison, the presumptive prison term range and the presumptive duration of the nonprison sanction as it relates to the crime severity scale and the court services officer's professional assessment as to recommendations for conditions to be included as part of the nonprison sanction.

- For defendants who are being sentenced for a conviction of a felony violation of K.S.A. 2011 Supp. 21-5706 [formerly K.S.A. 2010 Supp. 21-36a06], and meet the requirements of K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729] (2003 Senate Bill 123), the drug abuse assessment package as provided in K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729].

The presentence investigation report will become part of the court record and is accessible to the public, except that the official version, defendant's version, victim's statement, any psychological reports, drug and alcohol reports and assessments shall be accessible only to the parties, the sentencing judge, the department of corrections, and if requested, the Kansas Sentencing Commission. If the offender is committed to the custody of the secretary of corrections, the report shall be sent to the secretary and the warden of the state correctional institution to which the defendant is conveyed in accordance with K.S.A. 2010 Supp. 75-5220. K.S.A. 2011 Supp. 21-6813(c) [formerly K.S.A. 2010 Supp. 21-4714(c)].

The KSC has determined that noting on the PSI that an offense requires the offender to register under the 2011 amendments to KORA, 2011 K.S.A. 22-4901 et seq. is appropriate. Such a notation appears consistent with the requirement that the PSI include the presumptive sentence, in that K.S.A. 22-4902 now requires the court at sentencing, on the record, to inform the defendant of the requirement to register and the procedure to do so. This is especially significant when the offender may receive a non-prison sanction. The PSI notation will bring to the attention of the court and parties the statutory requirements for properly informing the offender of the registration requirements on the record, making sure that the registration forms are completed at sentencing, that the offender has read and signed the forms, and they have been explained to the offender. For a listing of offenses that require registration at this time, please refer to the Statute listing of the Kansas Criminal Code. Offenses requiring registration are marked with an "**R**".

Please Note: Under the new KORA, K.S.A. 22-4902 does not make each offender who sells, possesses with intent to sell, or cultivates a controlled substance, an offender who is required to register. For example, sale of cocaine, opiates, or meth in violation of K.S.A. 2011 Supp. 21-5705(a)(1) [formerly K.S.A. 21-36a05(a)(1) and all subsections, and formerly 65-4161 and all subsections], make the offender subject to the registration requirements. However, such offenses involving marijuana, depressants, stimulants, anabolic steroids, other hallucinogenics or analogs in violation of (a)(2) through (a)(6) **DO NOT** require registration. K.S.A. 2011 Supp. 21-5705 [formerly K.S.A. 21-36a05].

The 2011 PSI form also includes a checkbox next to the case number to indicate whether the trier of fact made a special finding that the case is a domestic violence case and the judge designated the case as a domestic violence case. K.S.A. 2011 Supp. 22-4616 and 22-4617.

The criminal history worksheet will not substitute as a presentence investigation report. K.S.A. 2011 Supp. 21-6813(d) [formerly K.S.A. 2010 Supp. 21-4714(d)].

The presentence investigation report will not include optional report components, which would be subject to the discretion of the sentencing court in each district except for psychological reports and drug and alcohol reports. K.S.A. 2011 Supp. 21-6813(e) [formerly K.S.A. 2010 Supp. 21-4714(e)].

Except as provided in K.S.A. 2011 Supp. 21-6814, the sentencing court may take judicial notice in a subsequent felony proceeding of an earlier criminal history worksheet included in a presentence

investigation report prepared for a prior sentencing of the defendant for a felony committed on or after July 1, 1993, as verification of the criminal history reflected on the worksheet. K.S.A. 2011 Supp. 21-6813(f) [formerly K.S.A. 2010 Supp. 21-4714(f)]. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

All presentence investigation reports in any case in which the defendant has been convicted of a felony shall be on a form approved by the Kansas Sentencing Commission. K.S.A. 2011 Supp. 21-6813(g) [formerly K.S.A. 2010 Supp. 21-4714(g)].

A copy of the Kansas Sentencing Guidelines Act Presentence Investigation Report form along with the instructions for completing the form are contained in Appendix A of this Manual.

CHAPTER VI: SENTENCING

SENTENCING RANGE

Each grid block states the presumptive sentencing range, in months, for an offender whose crime of conviction and criminal history place such offender in that grid block. The middle number in the grid block is the “standard” number of months, the upper number in the grid block is the “aggravated” number of months, and the lower number in the grid block is the “mitigated” number of months. If an offense is classified in a grid block below the dispositional line, the presumptive disposition shall be nonimprisonment. If an offense is classified in a grid block above the dispositional line, the presumptive disposition shall be imprisonment. See K.S.A. 2011 Supp. 21-6804 [formerly K.S.A. 2010 Supp. 21-4704].

SENTENCING OPTIONS

The sentencing court may impose any sentence within the presumptive sentencing range. The sentencing court should select the midpoint or standard term of months in the usual case and use the upper or lower term to take into account any aggravating and mitigating factors that do not amount to sufficient justification for a departure.

A sentence to any term, including an aggravated term, within the range in a Kansas sentencing guideline presumptive grid box is constitutional. Because a sentence that falls within a grid box is a presumptive sentence, appellate courts lack jurisdiction to consider a challenge to such sentence under K.S.A. 2011 Supp. 21-6820(c) [formerly K.S.A. 21-4721(c)]. Appellate courts lack jurisdiction even if the sentence is to the longest term in the presumptive grid box for a defendant’s convictions. *State v. Johnson*, 286 Kan. 824 (2008).

While the sentencing grids provide presumptive punishment for felony convictions, the sentencing court may depart from the presumptive sentence based upon substantial and compelling reasons. See K.S.A. 2011 Supp. 21-6804 and 21-6815 [formerly K.S.A. 2010 Supp. 21-4704 and K.S.A. 21-4716]. The sentencing court may lower the duration with some limitations (crimes of extreme sexual violence), or impose a dispositional departure when aggravating or mitigating circumstances exist which are substantial and compelling. See K.S.A. 2011 Supp. 21-6816(a), 21-6818(a) and (c)(2), and 21-6815(a) [formerly K.S.A. 2010 Supp. 21-4717(a), 21-4719(a) and (c)(2), and K.S.A. 21-4716(a)]. The court may impose an upward durational departure sentence of up to double the duration within the grid block, but only if a jury has unanimously found, beyond a reasonable doubt, the presence of an aggravating factor. The bifurcated guilt/aggravating factor jury procedure is provided for in K.S.A. 2011 Supp. 21-6815(b) and 21-6817(b) [formerly K.S.A. 21-4716 and 21-4718].

Authorized Dispositions K.S.A. 2011 Supp. 21-6604 [formerly K.S.A. 2010 Supp. 21-4603d]

Whenever a person has been convicted of a crime, the sentencing court has several sentencing options available that may be imposed either alone or in combination. The court may:

- Commit the defendant to the custody of the Secretary of Corrections if the current crime is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment;

- Commit the defendant to jail for the term provided by law if confinement is for a misdemeanor or a nongrid felony;
- Impose fines applicable to the offense that may be paid in installments if authorized by the court. The court may order performance of community service in lieu of payment of any fine imposed. The credit on the fine imposed will be applied at a rate of \$5 for each full hour of community service performed;
- Release the defendant on probation, under the supervision of a court services officer, if the defendant's crime and criminal history place such defendant in a presumptive nonprison category or, through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include the imposition of a jail term of not more than 60 days;
- Assign the defendant to a community correctional services program pursuant to K.S.A. 2010 Supp. 75-5291, or through a departure for substantial and compelling reasons and subject to conditions as the court deems appropriate which may include full or partial restitution;
- *Assign to a conservation camp for a period not to exceed 6 months as a condition of the probation followed by a 6 month period of follow-up through adult intensive supervision by a community correctional services program, if the offender successfully completes the conservation camp program;
- Assign the defendant to house arrest pursuant to K.S.A. 2011 Supp. 21-6609 [formerly K.S.A. 2010 Supp. 21-4603b];
- Order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (c) of K.S.A. 2011 Supp. 21-6602 [formerly subsection (3) of K.S.A. 2010 Supp. 21-4502];
- Order the defendant to repay the amount of any reward paid to aid in defendant's apprehension, any costs and expenses incurred by law enforcement to recapture defendant due to defendant's crime of escape, expenses incurred by firefighting agencies due to defendant's crime of arson, any public funds used by law enforcement to purchase controlled substances from the defendant during the investigation, any medical costs and expenses incurred by law enforcement;
- Order the defendant to pay the administrative fee authorized by K.S.A. 22-4529 unless waived by the court;
- Order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369;
- Order the defendant to a work release program, outside the control of the Department of Corrections, if the defendant is convicted of a felony, under K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)], or a misdemeanor. If work release is imposed for a second or third and subsequent DUI, the offender shall be required to serve a total of 120 or 240 hours of confinement, respectively. Such hours shall be a mandatory 48 consecutive hours confinement followed by confinement hours at the end of and continuing to the beginning of the offender's work day;
- Order the defendant to pay the full amount of unpaid costs associated with the conditions of release of the appearance bond under K.S.A. 22-2802;
- Order the defendant to pay restitution, including but not limited to, damages or loss caused by the defendant's crime unless the court finds a restitution plan unworkable due to compelling circumstances and states such on the record;
- Order the defendant to submit to and complete an alcohol and drug evaluation and pay a fee for such evaluation when required by subsection (d) of K.S.A. 2011 Supp. 21-6602 [formerly subsection (4) of K.S.A. 2010 Supp. 21-4502];

- Order the defendant to reimburse the county general fund for expenditures by the county to provide counsel and other defense services to the defendant, after any order for restitution has been paid in full;
- Order the defendant to reimburse the state general fund for all or a part of the expenditures by the state board of indigent's defense services to provide counsel and other defense services to the defendant.
- Decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty pursuant to any other Kansas statute.

*This option is included in statute, but is unavailable.

Fines

Felony and misdemeanor fines are as follows K.S.A. 2011 Supp. 21-6611, [formerly K.S.A. 21-4503a]:

Off-grid and drug severity level 1	≤ \$500,000
Nondrug severity level 1 through 5 and drug severity level 2 and 3	≤ \$300,000
Nondrug severity level 6 through 10 and drug severity level 4	≤ \$100,000
Class A misdemeanor	≤ \$2,500
Class B misdemeanor	≤ \$1,000
Class C misdemeanor	≤ \$500
Traffic infraction	≤ \$500
Cigarette or Tobacco infraction	\$25

As an alternative to any of the above fines, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender. K.S.A. 2011 Supp. 21-6611(c) [formerly K.S.A. 21-4503a(c)].

A civil penalty of up to \$25,000 may be imposed for each violation of the Kansas Securities Act. If the violation is committed against an elderly or disabled person, in addition to any civil penalty otherwise provided by law, the administrator may impose a penalty not to exceed \$15,000 for each violation. The total penalty against a person shall not exceed \$1,000,000. See K.S.A. 17-12a412(c)(3), 17-12a603(b)(2)(C) and 17-12a604(b)(1).

Presumptive Nonprison

In a presumptive nonprison case, the sentencing court must pronounce the duration of the nonprison sanction and must pronounce the underlying prison sentence. See K.S.A. 2011 Supp. 21-6804(e)(3), 21-6805(c)(3) and 21-6806(b) [formerly K.S.A. 2010 Supp. 21-4704(e)(3), 21-4705(c)(3) and K.S.A. 21-4706(b)].

Duration of Probation (Court Services or Community Corrections)

For all crimes committed on or after July 1, 1993, the duration of probation in felony cases sentenced for the following severity levels is as follows [K.S.A. 2011 Supp. 21-6608(c), formerly K.S.A. 2010 Supp. 21-4611(c)]:

Severity Level	1	2	3	4	5	6	7	8	9	10
Nondrug	36	36	36	36	36	24	24	≤18	≤12	≤12
Drug	36	36	≤18	* ≤12	N/A	N/A	N/A	N/A	N/A	N/A

* Except for SB 123 sentences, where the standard probation term is up to 18 months. K.S.A. 2011 Supp. 21-6608(c)(4) [formerly K.S.A. 2010 21-4611(c)(4)].

The KSGA recommends probation duration periods for crimes ranked on the nondrug grid at severity levels 1 through 7 and on the drug grid for severity levels 1 and 2. With three exceptions, the total period in all cases shall not exceed 60 months or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2011 Supp. 21-6608(c) [formerly K.S.A. 2010 Supp. 21-4611(c)(6)].

- The first exception is that the sentencing court may modify or extend the period of supervision, pursuant to a modification hearing and a judicial finding of necessity, up to a maximum of five (5) years or the maximum period of the prison sentence that could be imposed, whichever is longer. K.S.A. 2011 Supp. 21-6608(c)(8) [formerly K.S.A. 2010 Supp. 21-4611(c)(8)].
- Second, if the defendant is convicted of nonsupport of a child, the period may be extended as long as the responsibility for support continues. K.S.A. 2011 Supp. 21-6608(c)(7) [formerly K.S.A. 2010 Supp. 21-4611(c)(7)].
- Third, if the defendant is ordered to pay full or partial restitution, the period may be extended as long as the amount of restitution ordered has not been paid. K.S.A. 2011 Supp. 21-6608(c)(7) [formerly K.S.A. 2010 Supp. 21-4611(c)(7)]. Other unpaid assessments, such as costs, BIDS fee reimbursements, and lab fees are not restitution, and thus the fact that such may remain unpaid does not justify a probation extension under the statute. *State v. Hoffman*, 45 Kan.A.2d 272, 246 P.3d 992 (2011).

The KSGA sets upper limits on probation duration periods for sentences on severity levels 8 through 10 on the nondrug grid and severity levels 3 and 4 on the drug grid. For crimes at these severity levels, the sentencing court may impose a longer period of probation if the court finds and sets forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4) of K.S.A. 2011 Supp. 21-6608 [formerly (c)(3) and (c)(4) of K.S.A. 2010 Supp. 21-4611]. K.S.A. 2011 Supp. 21-6608(c)(5) [formerly K.S.A. 2010 Supp. 21-4611(c)(5)].

Conditions of Probation

Court services and community corrections officers may recommend conditions of probation for offenders ordered to community placement. The maximum amount of time an offender can be incarcerated in a county jail as a condition of probation in a felony case is 60 days (with an additional maximum of 60 days in jail as a condition of a probation revocation), except for convictions for felony driving under the influence. K.S.A. 2011 Supp. 21-6604(a)(3) [formerly K.S.A. 2010 Supp. 21-4603d(a)(3)].

Target Population for Community Corrections (2000 Senate Bill 323)

K.S.A. 2011 Supp. 75-5291(a)(2) defines the target population of offenders for placement in Community Corrections programs. This target population consists of adult offenders convicted of felony offenses who meet one of the following criteria:

- Offenders whose sentence falls within the designated border boxes on either the drug or nondrug sentencing grids;
- Offenders whose sentence falls within nondrug grid blocks 6-H, 6-I, 7-C, 7-D, 7-E, 7-F, 7-G, 7-H, or 7-I;
- Offenders whose severity level and criminal history classification designate a presumptive prison sentence on either grid but receive a nonprison sentence as the result of a dispositional departure;

- Offenders convicted of a sex offense as defined in K.S.A. 2011 Supp. 22-4902, classified as a severity level 7 or higher, and who receive a nonprison sentence, regardless of the manner in which the sentence is imposed;
 - Offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established as provided in K.S.A. 2011 Supp. 22-3716 prior to revocation to a state correctional facility;
 - Offenders who are determined to be “high risk or needs, or both” by the use of a statewide, mandatory, standardized risk assessment tool or instrument approved by KSC (effective January 1, 2011);
 - Offenders who are placed in community correctional services programs as a condition of supervision following the successful completion of a conservation camp program;
 - Offenders who have been sentenced to community corrections supervision pursuant to K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729 - 2003 Senate Bill 123].
- Juvenile offenders may be placed in community corrections programs if the local community corrections advisory board approves. However, grants from the community corrections fund administered by the Secretary of Corrections cannot be used for this service. K.S.A. 2011 Supp. 75-5291(a)(4). A public safety provision also allows direct revocation to prison from supervision by court services for offenders for whom a violation of conditions of release or assignment or a nonprison sanction has been established, as provided in K.S.A. 2011 Supp. 22-3716, if the sentencing court sets forth with particularity why placement in community corrections would jeopardize public safety or would not be in the best interest of the offender. K.S.A. 2011 Supp. 75-5291(a)(5).

Target Population for Treatment (2003 Senate Bill 123)

K.S.A. 2011 Supp. 21-6604(n) [formerly K.S.A. 2010 Supp. 21-4603d(n)] provides a nonprison sanction of certified drug abuse treatment under community corrections supervision for a defined target population of offenders. This target population is defined in K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729] and consists of **adult** offenders convicted of K.S.A. 2011 Supp. 21-5706 [formerly K.S.A. 2010 Supp. 21-36a06(a) or (b)], who meet one of the following criteria:

- Offenders whose offense is in the 4-E, 4-F, 4-G, 4-H or 4-I grids blocks of the drug grid and who have no prior conviction(s) of:
 - K.S.A. 2011 Supp. 21-5716 [formerly K.S.A. 2010 Supp. 21-36a16]. Conducting financial transaction involving proceeds derived from the commission of a Chapter 21 drug crime;
 - K.S.A. 2011 Supp. 21-5703 [formerly K.S.A. 2010 Supp. 21-36a03]. Manufacturing of any controlled substance or controlled substance analog;
 - K.S.A. 2011 Supp. 21-5705 [formerly K.S.A. 2010 Supp. 21-36a05(a)(1)]. Cultivation, distribution or possession with intent to distribute controlled substances or analogs;
 - or any similar offense from another jurisdiction; or
- Offenders whose offense is in the 4-A, 4-B, 4-C, or 4-D grids blocks of the drug grid and who have no prior conviction(s) of the crimes listed in items 1 above, **if** the offender’s prior person felony conviction(s) were severity level 8, 9, or 10 or nongrid offenses and the sentencing court finds and sets forth with particularity the reasons for finding that public safety will not be jeopardized by placement of the offender in a certified drug abuse treatment program. K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729].

NOTE: Offenders convicted of **attempted** possession are not eligible for SB 123. *State v. Perry-Coutcher*, 45 Kan.App.2d 911 (2011).

Offenders whose offense is classified in the 4-E or 4-F drug grid blocks but do not qualify for the certified drug treatment program, must be considered for the Labette Correctional Conservation Camp before a sentencing court may impose a dispositional departure. This must also be done prior to the revocation of a nonprison sanction for an offender whose offense is classified in the 4-E or 4-F drug grid blocks but does not qualify for the certified drug treatment program. K.S.A. 2011 Supp. 21-6604(g) [formerly K.S.A. 2010 Supp. 21-4603d(g)].

The Secretary of Corrections may also make direct placement to Labette Correction Conservation Camp for offenders whose offense is classified in the 4-E or 4-F drug grid blocks if those offenders do not otherwise meet the requirements of K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729]. K.S.A. 2011 Supp. 21-6604(l) [formerly K.S.A. 2010 Supp. 21-4603d(l)].

However, the Kansas Court of Appeals, in *State v. Johnson*, 42 Kan. App. 2d 356 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2011 Supp. 21-6604(g) [formerly K.S.A. 2010 Supp. 21-4603d(g)]. With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections. In practice, all the nonprison alternatives provided in K.S.A. 2011 Supp. 21-6604(g) [formerly K.S.A. 2010 Supp. 21-4603d(g)] either never was created or currently no longer exist as viable placement alternatives.

On or after July 1, 2006, offenders, who are residents of another state and are returning to such state pursuant to the interstate corrections compact or the interstate compact for adult offender supervision, or who are not lawfully present in the United States and being detained for deportation, are not eligible for treatment under SB 123 and shall be sentenced as otherwise provided by law. K.S.A. 2011 Supp. 21-6824(h) [formerly K.S.A. 2010 Supp. 21-4729(h)].

If an offender is revoked from the SB 123 program, and sentenced to the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision. The amount of time spent participating in the SB 123 program shall not be credited as service on the underlying prison sentence. K.S.A. 2011 Supp. 21-6604(n) [formerly K.S.A. 2010 Supp. 21-4603d(n)]. In *State v. Preston*, 287 Kan. 181, 183–85, 195 P.3d 240 (2008), the Court held that K.S.A. 21-4603d[n] supersedes the more general provisions of K.S.A. 21-4614a, and denied defendant jail time credit for time spent in an inpatient drug treatment program.

Presumptive Imprisonment

In presumptive imprisonment cases, the sentencing court must pronounce the prison sentence, the maximum potential good time reduction to such sentence and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision will not negate the period of postrelease supervision. K.S.A. 2011 Supp. 21-6804(e)(2) and 21-6805(c)(2) [formerly K.S.A. 2010 Supp. 21-4704(e)(2) and 2010 Supp. 21-4705(c)(2)].

Good Time

The prison sentence represents the time an offender actually serves, subject to a maximum reduction of:

- 20% good time for crimes committed on or after July 1, 1993 and prior to April 20, 1995;

- 15% good time for crimes committed on or after April 20, 1995; or,
- 20% good time for crimes of drug severity level 3 or 4 or nondrug severity level 7-10 committed on or after January 1, 2008, but otherwise 15%. K.S.A. 2011 Supp. 21-6804(a) and 21-6821(a)(2) [formerly K.S.A. 21-4706(a) and 21-4722(a)(2)].

Any reduction in the prison sentence due to good time must be added to the postrelease supervision period to be served after the prison sentence is completed. K.S.A. 2011 Supp. 21-6821(c) [formerly K.S.A. 21-4722(b)].

In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce the period of postrelease supervision shall not negate the existence of such period of postrelease supervision. K.S.A. 2011 Supp. 21-6804(e)(2) [formerly K.S.A. 2010 Supp. 21-4704(e)(2)].

Border Boxes

If an offense is classified in grid blocks 5-H, 5-I or 6-G of the nondrug grid, or grid blocks 3-E, 3-F, 3-G, 3-H or 3-I of the drug grid, the sentence is presumed imprisonment, but the court may impose an optional nonprison sentence upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or
- the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6804(f) and 21-6805(d) [formerly K.S.A. 2010 Supp. 21-4704(f) and 21-4705(d)].

Aggravated Habitual Sex Offender

K.S.A. 2011 Supp. 21-6626(a) [formerly K.S.A. 2010 Supp. 21-4642(a)] provides that the sentence for an aggravated habitual sex offender shall be imprisonment for life without the possibility of parole in the custody of the secretary of corrections. An offender who is sentenced pursuant to this section shall not be eligible for parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, or suspension, modification or reduction of sentence.

Effective July 1, 2011, an “aggravated habitual sex offender” is defined as a person who, on and after July 1, 2006: (A) has been convicted in this state of a sexually violent crime; and (B) prior to the current conviction has been convicted of two or more sexually violent crimes. K.S.A. 2011 Supp. 21-6626(c) [formerly K.S.A. 2010 Supp. 21-4642(c)].

Upon sentencing a defendant pursuant to this section, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole. K.S.A. 2011 Supp. 21-6626(b) [formerly K.S.A. 2010 Supp. 21-4642(b)].

SPECIAL SENTENCING RULES

Public Safety Offenses / Firearms Finding:

1. Person Felony Committed With a Firearm

When a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6804(h) [formerly K.S.A. 2010 Supp. 21-4704(h)].

2. Aggravated Battery Against a Law Enforcement Officer

The sentence for the violation of K.S.A. 21-3415, prior to its repeal, (aggravated battery against a law enforcement officer), if committed prior to July 1, 2006, which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6804(g) [formerly K.S.A. 2010 Supp. 21-4704(g)].

3. Aggravated Assault Against a Law Enforcement Officer

The sentence for the violation of subsection (d) of K.S.A. 2011 Supp. 21-5412 [formerly K.S.A. 21-3411 - aggravated assault of a law enforcement officer], which places the defendant's sentence in grid blocks 6-H or 6-I shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence upon making a finding on the record that the nonprison sanction will serve community safety interests by promoting offender reformation. Any decision made by the sentencing court to impose an optional nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6804(g) [formerly K.S.A. 2010 Supp. 21-4704(g)].

34. Battery on a Law Enforcement Officer

A special sentencing rule exists for a violation of subsection (c)(2) of K.S.A. 2011 Supp. 21-5413 [formerly K.S.A. 21-3413(a)(2)], battery on a law enforcement officer where **bodily harm occurs**. The sentence shall be presumptive imprisonment and shall be served consecutively to any other terms imposed. A law enforcement officer shall include a uniformed or properly identified university campus police, or state, county, or city law enforcement officer, other than a juvenile or adult correctional officer. K.S.A. 2011 Supp. 21-6804(r) [formerly K.S.A. 2010 Supp. 21-4704(q)].

32. Drug Felony Committed - Firearm Carried or Possessed

If the trier of fact makes a finding that the offender carried a firearm to commit a drug felony, or possessed a firearm in furtherance of a drug felony, the sentence imposed shall be enhanced by an additional 6 months imprisonment and such additional sentence shall be presumptive imprisonment. This special rule DOES NOT apply to K.S.A. 2011 Supp. 21-5706 or 21-5713 [formerly K.S.A. 2010 Supp. 21-36a06, possession, or 21-36a13, possession or distribution of a simulated controlled substance]. K.S.A. 2011 Supp. 21-6805(g) [formerly K.S.A. 2010 Supp. 21-4705(g)].

33. Drug Felony Committed - Firearm Discharged

If the trier of fact makes a finding that the offender discharged a firearm when committing a drug felony, the sentence imposed shall be enhanced by an additional 18 months imprisonment and such additional sentence shall be presumptive imprisonment. This special rule DOES NOT apply to K.S.A. 2011 Supp. 21-5706 or 21-5713 [formerly K.S.A. 2010 Supp. 21-36a06, possession, or 21-36a13, possession or distribution of a simulated controlled substance]. K.S.A. 2011 Supp. 21-6805(g) [formerly K.S.A. 2010 Supp. 21-4705(g)].

4. Crime Committed for the Benefit of a Criminal Street Gang

If it is shown at sentencing that the offender committed any felony violation for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members, the sentence shall be presumed imprisonment. The sentencing court may impose an optional nonprison sentence and such nonprison sentence is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6804(k) [formerly K.S.A. 2010 Supp. 21-4704(k)].

11. Extended Jurisdiction Juvenile Imposed

If an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall; (1) impose one or more juvenile sentences under K.S.A. 2011 Supp. 38-2361 and, (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment must be completed for these cases.* K.S.A. 2011 Supp. 38-2364(a).

35. Aggravated Endangering a Child

The sentence for violation of subsection (b) of K.S.A. 2011 Supp. 21-5601 [formerly K.S.A. 21-3608a] aggravated endangering of a child, is a nondrug severity 9, person felony, and shall be served consecutively to any other term or terms of imprisonment imposed by the court. Such sentence is not a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-5601(d).

36. Ballistic Resistant Material

If the trier of fact makes a finding that an offender wore or used ballistic resistant material during the commission of, attempt to commit, or flight from any felony, the sentence shall be enhanced by an additional 30 months imprisonment. Such additional sentence shall be presumptive prison and shall be served consecutively to any other term or terms of imprisonment imposed. K.S.A. 2011 Supp. 21-6804(t).

38. Unlawful Sexual Relations

The sentence for a violation of K.S.A. 21-5512, [formerly K.S.A. 21-3520], and amendments thereto, shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 21-6804(s) [formerly in K.S.A. 21-4704].

Habitual or Repeat Offenses:

5. Persistent Sex Offender

The sentence for any persistent sex offender, as defined in K.S.A. 2011 Supp. 21-6804(j), [formerly K.S.A. 2010 Supp. 21-4704(j)] whose current crime of conviction carries a presumptive term of imprisonment shall be double the maximum duration of the presumptive imprisonment term. The sentence for any persistent sex offender whose current conviction carries a presumptive nonprison term shall be presumed imprisonment and shall be double the maximum duration of the presumptive imprisonment term. However, the provisions of this subsection shall not apply to any person whose current crime of conviction is a severity level 1 or 2 nondrug felony, unless such current conviction is for the crime of rape, K.S.A. 2011 Supp. 21-5503, [formerly K.S.A. 21-3502] and the offender has at least one prior conviction for rape in this state or a comparable felony from another jurisdiction. K.S.A. 2011 Supp. 21-6804(j) [formerly K.S.A. 2010 Supp. 21-4704(j)].

A prior conviction used to classify a defendant as a persistent sex offender may not again be used to calculate the defendant's criminal history category. K.S.A. 2011 Supp. 21-6810(d)(9) [formerly K.S.A. 21-4710(d)(11)], see also *State v. Taylor*, 27 Kan. App. 2d 62, 998 P.2d 123 (2000), cited with approval in *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

Example

- An offender's current crime of conviction is sexual exploitation of a child, a severity level 5 person felony. K.S.A. 2011 Supp. 21-5510 [formerly K.S.A. 21-3516]. The offender has one prior conviction of indecent solicitation of a child, K.S.A. 2011 Supp. 21-5508 [formerly K.S.A. 21-3510]. The offender's prior conviction will be used to determine the offender's status as a "persistent sex offender" and will not be used in calculating the offender's criminal history category. Therefore, the offender will have a criminal history score of 5-I (sentence doubled) if the offender has no other criminal convictions.
- An offender's current conviction is indecent solicitation of a child, a severity level 6 person felony, K.S.A. 2011 Supp. 21-5508 [formerly K.S.A. 21-3510]. The offender has two prior convictions of indecent solicitation of a child. One prior conviction of indecent solicitation of a child will be used to determine the offender's status as a "persistent sex offender" and the other conviction will be used in calculating the offender's criminal history score. Therefore, the offender will have a criminal history score of 6-D (sentence doubled) if the offender has no other person/nonperson felony convictions.

12. Second or Subsequent Conviction for Manufacture of a Controlled Substance

The sentence for a second or subsequent conviction for the manufacture of a controlled substance under K.S.A. 2011 Supp. 21-5703 [formerly K.S.A. 2010 Supp. 21-36a03], is a severity level 1 drug felony and the sentencing court is required to double the presumptive sentence length. However, the sentencing court may reduce the sentence in an amount not to exceed 50 percent of the special sentence length increase if mitigating circumstances exist. Any decision made by the sentencing court regarding the reduction is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6805(e) [formerly K.S.A. 2010 Supp. 21-4705(e)].

26. Third or Subsequent Conviction for Drug Possession

The sentence for a third or subsequent felony conviction of K.S.A. 2011 Supp. 21-5706 [formerly K.S.A. 2010 Supp. 21-36a06], shall be presumed imprisonment if the third or subsequent felony occurred on or after July 1, 2008. If the conviction occurred prior to July 1, 2008, then the sentence

shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section, **if**:

- the defendant has previously completed a certified drug abuse program;
- the defendant has previously been discharged from a certified drug abuse program; or
- the defendant has previously refused to participate in a certified drug abuse program, as provided in K.S.A. 2011 Supp. 75-52,144.

Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2011 Supp. 21-6805(f) [formerly K.S.A. 2010 Supp. 21-4705(f)].

13. Residential Burglary with a Prior Residential, Non-Residence, Aggravated Burglary Conviction

The sentence for the violation of burglary of a residence, subsection (a) of K.S.A. 21-3715, prior to its repeal, subsection (a)(1) of K.S.A. 2011 Supp. 21-5807, *or an attempt or conspiracy to commit such*, when the offender has a prior conviction for residential or nonresidential burglary, subsections (a) or (b) of K.S.A. 21-3715, prior to its repeal, subsections (a)(1) or (a)(2) of K.S.A. 2011 Supp. 21-5807 (automobile burglary is not included), aggravated burglary, K.S.A. 21-3716, prior to its repeal, subsection (b) of K.S.A. 2011 Supp. 21-5807, *or an attempt or conspiracy to commit such*, shall be presumed imprisonment. K.S.A. 2011 Supp. 21-6804(l) [formerly K.S.A. 2010 Supp. 21-4704(l)].

27. Burglary with Two or More Prior Convictions for a Felony Violation of Theft, Burglary or Aggravated Burglary

The sentence for a violation of burglary, K.S.A. 2011 Supp. 21-5807(a) [formerly K.S.A. 21-3715], when the offender has any combination of two or more prior convictions of theft, (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2011 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2011 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2011 Supp. 21-6804(p) [formerly K.S.A. 2010 Supp. 21-4704(p)].

29. Felony Theft with Three or More Prior Convictions for a Felony Violation of Theft, Burglary, or Aggravated Burglary

The sentence for a violation of theft of property, K.S.A. 2011 Supp. 21-5801, [formerly K.S.A. 21-3701], when the offender has any combination of three or more prior felony convictions for violations of theft (K.S.A. 21-3701, prior to its repeal), burglary (K.S.A. 21-3715, prior to its repeal), aggravated burglary (K.S.A. 21-3716, prior to its repeal), theft of property as defined in K.S.A. 2011 Supp. 21-5801, burglary or aggravated burglary as defined in K.S.A. 2011 Supp. 21-5807, shall be presumed imprisonment and the defendant shall be sentenced to prison as provided by this section. K.S.A. 2011 Supp. 21-6804(p) [formerly K.S.A. 2010 Supp. 21-4704(p)].

30. Substance Abuse Underlying Factor

The court may make findings that substance abuse is the underlying factor in the commission of crimes under #27 and #29 above and place the offender in an intensive treatment program for at least 4 months if the state substance abuse facility is likely to be more effective than prison in reducing the risk of offender recidivism, serve community safety interests and promote offender reformation; return to court upon successful completion. K.S.A. 2011 Supp. 21-6804(p) [formerly K.S.A. 2010 Supp. 21-4704(p)]. While this option is authorized by statute, it has never been funded and is not, therefore, an available option.

31. Third or Subsequent Criminal Deprivation of a Motor Vehicle

The sentence for a third or subsequent violation of criminal deprivation of property that is a motor vehicle pursuant to K.S.A. 2011 Supp. 21-5803(b) [formerly K.S.A. 2010 Supp. 21-3705(b)] shall be presumptive imprisonment. Such sentence shall not be considered a departure and shall not be subject to appeal. K.S.A. 2011 Supp. 21-6804(n) [formerly K.S.A. 2010 Supp. 21-4704(n)].

16. Second Forgery

The crime of forgery is a severity level 8, nonperson felony on the nondrug grid. The sentence for a felony violation of K.S.A. 2011 Supp. 21-5823(b)(3) [formerly K.S.A. 21-3710(b)(3)] shall be as provided by the specific mandatory sentencing requirements of that statute unless the new conviction places the offender in the criminal history category A or B. In such case, the sentence shall be as for a severity level 8, nonperson felony. K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].

The specific mandatory sentencing provisions of K.S.A. 2011 Supp. 21-5823 [formerly K.S.A. 21-3710] provide that upon a first conviction for forgery, the offender is to be fined the lesser of the amount of the forged instrument or \$500. For a second conviction of forgery the offender is required to serve at least 30 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$1,000. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 2011 Supp. 21-5823(b) [formerly K.S.A. 21-3710(b)].

State v. Luttig, 40 Kan. App. 2d 1095 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty could not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31 (2010). However, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction.

17. Third or Subsequent Conviction for Forgery

Upon a third or subsequent conviction of forgery the offender is required to serve at least 45 days imprisonment as a condition of probation and is to be fined the lesser of the amount of the forged instrument or \$2,500. The offender is not eligible for release on probation, suspension, or reduction of sentence or parole until after serving the mandatory 30 or 45 day sentences as provided herein. K.S.A. 2011 Supp. 21-5823(b) [formerly K.S.A. 21-3710(b)].

State v. Luttig, 40 Kan. App. 2d 1095 (2009) identified this shock time jail sentence as a penalty enhancement, and therefore prior convictions of forgery used to enhance the penalty may not be used for criminal history purposes. The Kansas Supreme Court affirmed this holding in *State v. Gilley*, 290 Kan. 31 (2010). As noted above, however, 2010 House Bill 2469, effective April 8, 2010, amended K.S.A. 2010 Supp. 21-4710(d)(11) [now K.S.A. 21-6810(d)(9)], to provide for inclusion of prior offenses in the criminal history that enhance a penalty so long as they do not enhance the severity level of the offense, elevate the classification from misdemeanor to felony, or are not elements of the present crime of conviction.

37. Second or Subsequent Identity Theft or Identity Fraud

The sentence for a violation of identity theft or identity fraud as defined in K.S.A. 2011 Supp. 21-6107, or any attempt or conspiracy to commit such offense, shall be presumptive prison when the offender has a prior conviction for a violation of identity theft under K.S.A. 21-4018, prior to its repeal, or identity theft or identity fraud under this statute, or any attempt or conspiracy to commit such offense. Such sentence is not considered a departure and is not subject to appeal. K.S.A. 2011 Supp. 21-6805(u).

9. Crime Committed While Incarcerated and Serving a Felony Sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony

Under any of these conditions, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2011 Supp. 21-6606 [formerly K.S.A. 2010 Supp. 21-4608] and the sentencing court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. K.S.A. 2011 Supp. 21-6604(f)(1) [formerly K.S.A. 2010 Supp. 21-4603d(f)(1)] and also *State v. Allen*, 28 Kan. App. 2d 784, 20 P.3d 747 (2001). See also K.S.A. 2011 Supp. 21-6606(e)(2) [formerly K.S.A. 2010 Supp. 21-4608(e)(2)] (serving indeterminate sentence).

28. Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense Which if Committed by an Adult Would be a Felony

A special rule pertains to juveniles who commit a new felony while incarcerated in a juvenile correctional facility for a crime which if committed by an adult would be a felony. In such instances, the court shall sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime does not constitute a departure. The conviction shall operate as a full and complete discharge from any obligations, except for an order of restitution, imposed on the offender arising from the offense for which the offender was committed to a juvenile correctional facility. K.S.A. 2011 Supp. 21-6804(f)(2) [formerly K.S.A. 2010 Supp. 21-4603d(f)(2)].

10. Crime Committed While the Offender is on Release for a Felony Bond

When a new felony is committed while the offender is on release pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated, or similar provisions of the laws of another jurisdiction, a new sentence may be imposed pursuant to the consecutive sentencing requirements of K.S.A. 2011 Supp. 21-6606 [formerly K.S.A. 2010 Supp. 21-4608] and the sentencing court may sentence an offender to imprisonment for the new conviction, even if the new crime of conviction otherwise presumes a nonprison sentence. Imposition of a prison sentence for the new crime committed while on release for a felony does not constitute a departure. K.S.A. 2011 Supp. 21-6604(f)(3) [formerly K.S.A. 2010 Supp. 21-4603d(f)(3)]. However, K.S.A. 2011 Supp. 21-6606(d) [formerly K.S.A. 21-4608(d)] indicates that any person who is convicted and sentenced for a crime committed while on release for a felony pursuant to article 28 of chapter 22 of the Kansas Statutes Annotated shall serve the sentence consecutively to the term or terms under which the person was released. Because of this conflict, a court imposing a consecutive sentence should clarify that consecutive sentencing was done in the exercise of discretion, not because it was mandated.

Nongrid Offenses:

6. Felony DUI

Felony driving under the influence as defined in K.S.A. 2011 Supp. 8-1567 is a nongrid crime with no guidelines severity level or other connection to the KSGA. Instead, the specific sentencing provisions of the DUI statute determine the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)]. However, for a third or subsequent DUI, an offender is required to serve a mandatory period of one year supervision under the supervision of community correctional services or court services, as determined by the court. Any violation of the conditions of such supervision may subject the person to revocation and imprisonment in jail for the remainder of the period of imprisonment, supervision period, or any combination or portion thereof. K.S.A. 2011 Supp. 8-1567(b)(3).

8. Felony Domestic Battery

Felony domestic battery, as defined in K.S.A. 2011 Supp. 21-5414(b)(3) [formerly K.S.A. 2010 Supp. 21-3412a], is a nongrid person felony with no guidelines severity level or other connection to the KSGA. The specific sentencing provision of the domestic battery statute determines the sentence. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence imposed. K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].

21. Animal Cruelty

Felony animal cruelty, as defined in subsections (a)(1), (a)(6) or (b)(2)(B) of K.S.A. 2011 Supp. 21-6412, [formerly K.S.A. 2010 Supp. 21-4310(a)(1) and (d)(2) (second or subsequent conviction of a violation of (a)(2), (a)(3), (a)(4), or (a)(5))], is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2011 Supp. 21-6412(b)(1) or (b)(2)(B) [formerly K.S.A. 2010 Supp. 21-4310(d)(1) or (d)(2)]. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2011 Supp. 21-6412 and 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4310 and 21-4704(i)].

Felony animal cruelty involving a working or assistance dog, as defined in K.S.A. 2011 Supp. 21-6416(a) [formerly K.S.A. 21-4318(a)], is a nongrid nonperson felony with no guidelines severity level or other connection to the KSGA. The sentence for felony animal cruelty of a working or assistance dog shall be as provided by the specific mandatory sentencing requirements of K.S.A. 2011 Supp. 21-6416(b) [formerly K.S.A. 21-4318(c)]. Additionally, the offender cannot be sent to a state correctional facility to serve the sentence. K.S.A. 2011 Supp. 6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].

Finance Offenses:

25. Fraudulent Insurance Act

A fraudulent insurance act shall constitute a severity level 6, nonperson felony if the amount involved is \$25,000 or more; a severity level 7, nonperson felony if the amount involved is at least \$5,000 but less than \$25,000; a severity level 8, nonperson felony if the amount involved is at least \$1,000 but less than \$5,000; and a class C nonperson misdemeanor if the amount is less than \$1,000. Any combination of fraudulent acts occurring within a period of six consecutive months which involves \$25,000 or more shall have a presumptive prison sentence of imprisonment regardless of its location on the sentencing grid block. K.S.A. 2010 Supp. 40-2,118(e)

15. Kansas Uniform Securities Act

Any violation of the Kansas Uniform Securities Act, K.S.A. 17-12a101 *et seq.*, resulting in a loss of \$25,000 or more, shall have a presumptive sentence of imprisonment regardless of the offender's presumptive sentence as located on the nondrug grid. K.S.A. 2011 Supp. 17-12a508(a)(5).

19. Mortgage Business Act

Any person who willfully or knowingly violates any of the provisions of this act, any rule, and regulation adopted or order issued under this act commits a severity level 7 nonperson felony. A second or subsequent conviction of this act, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 2010 Supp. 9-2203(d).

20. Loan Brokers Act

Any person who willfully violates any provision of this act or knowingly violates any cease and desist order issued under this act commits a severity level 7, nonperson felony. Any violation of this act committed on or after July 1, 1993 and resulting in a loss of \$25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment. K.S.A. 50-1013(a).

SPECIAL SENTENCING CONSIDERATIONS

Correctional Conservation Camps

The sentencing court shall consider placement of an offender in the Labette Correctional Conservation Camp, conservation camps established by the Secretary of Corrections pursuant to K.S.A. 2011 Supp. 75-52,127, or a community intermediate sanction center in the following instances:

Prior to imposing a dispositional departure for a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guidelines grid;

- Prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, or in grid blocks 3-E, 3-F, 3-G, 3-H, or 3-I of the sentencing guidelines grid for drug crimes;
- Prior to sentencing a defendant to incarceration whose offense is classified in grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729];
- Prior to revocation of a nonprison sanction of a defendant whose offense is classified grid blocks 4-E or 4-F of the sentencing guidelines grid for drug crimes and whose offense does not meet the requirements of K.S.A. 2011 Supp. 21-6824 [formerly K.S.A. 2010 Supp. 21-4729];
or
- Prior to revocation of a nonprison sanction of a defendant whose offense is classified in the presumptive nonprison grid block of either sentencing guideline grid or grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes or in grid blocks 3-E, 3-F, 3-G, 3-H, or 3-I, of the sentencing guidelines grid for drug crimes.

A defendant shall not be sentenced to imprisonment if space is available in a conservation camp or a community intermediate sanction center and the defendant meets all the conservation camp's or a community intermediate sanction center's placement criteria, unless the sentencing court states on the record the reasons for not placing the offender in a conservation camp or a community intermediate sanction center. K.S.A. 2011 Supp. 21-6604(g) [formerly K.S.A. 2010 Supp. 21-4603d(g)].

NOTE: The Kansas Court of Appeals, in *State v. Johnson*, 42 Kan. App. 2d 356 (2009), took judicial notice that the Labette facility has ceased to operate as of June 30, 2009. The notice from the Secretary of Corrections indicated that the facility is closed for both male and female offenders. As stated in the notice, the facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 2010 Supp. 21-4603d(g). With the closing of Labette, there is no longer any conservation camp in Kansas operated by the Department of Corrections. In practice, all the nonprison alternatives provided in K.S.A. 2010 Supp. 21-4603d(g) either never was created or currently no longer exist as viable placement alternatives.

Revocation of Nonprison Sanction of Certified Drug Abuse Treatment - K.S.A. 2011 Supp. 21-6824, [formerly K.S.A. 2010 Supp. 21-4729]

If the offender fails to participate in or has a pattern of intentional conduct that demonstrates the offender's refusal to comply with or participate in the treatment program, as established by judicial finding or is convicted of a new felony, the offender shall be subject to revocation of probation and shall serve the underlying prison sentence as established in K.S.A. 2011 Supp. 21-6805 [formerly K.S.A. 2010 Supp. 21-4705]. K.S.A. 2011 Supp. 21-6604 and 21-6824(f) [formerly K.S.A. 2010 Supp. 21-4603d(n) and 21-4729(f)]. In addition, K.S.A. 2011 Supp. 21-6607 [formerly K.S.A. 21-4610] grants the district court broad discretion concerning the conditions and revocation of probation. Therefore, condition violations may also result in discharge from the mandatory drug abuse treatment. See *State v. Gumfory*, 281 Kan. 1168, (2006) [holding that K.S.A. 21-4729(f)(1)(A) and (B) do not set forth exclusive grounds for revocation of an SB 123 sentence]. If the offender is revoked, upon completion of the underlying prison sentence, the offender shall not be subject to a period of postrelease supervision and the amount of time spent participating in such program shall not be credited as time against the underlying prison sentence. K.S.A. 2011 Supp. 21-6604(n) [formerly K.S.A. 2010 Supp. 21-4603d(n)].

MULTIPLE CONVICTIONS; SENTENCES ON SAME DATE

When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community correctional services program have been revoked, such sentences shall run concurrently or consecutively at the discretion of the sentencing court. If the sentencing court is silent as to whether multiple sentences are to run consecutively or concurrently, the sentences shall run concurrently except as provided by K.S.A. 2011 Supp. 21-6606(c), (d) and (e) [formerly K.S.A. 2010 Supp. 21-4608(c), (d) and (e)]. *The sentencing court must state on the record whether the sentence is to be served concurrently or consecutively.* K.S.A. 2011 Supp. 21-6606 and 21-6819(b) [formerly K.S.A. 2010 Supp. 21-4608 and K.S.A. 21-4720(b)].

Limitations on Concurrent and Consecutive Sentences for Multiple Convictions

Consecutive sentencing is mandatory in certain circumstances if it will not result in a manifest injustice. K.S.A. 2011 Supp. 21-6819(a) [formerly K.S.A. 21-4720(a)]. Consecutive sentencing is generally required when imposing:

- A sentence for a felony committed while the offender was on probation, assigned to a community corrections services program, on parole, conditional release, postrelease supervision, or serving time for a felony; K.S.A. 2011 Supp. 21-6606(c), [formerly K.S.A. 2010 Supp. 21-4608].

- A sentence for a felony committed while the offender was on felony bond; K.S.A. 2011 Supp. 21-6606(d), [formerly K.S.A. 2010 Supp. 21-4608].
- A sentence for a knowing or reckless violation of battery against a law enforcement officer; K.S.A. 2011 Supp. 21-6804(r), [formerly K.S.A. 2010 Supp. 21-4704(q)].
- A sentence for a felony committed while the offender was incarcerated and serving a sentence for a felony in any place of incarceration. K.S.A. 2011 Supp. 21-6606(e)(1) [formerly K.S.A. 2010 Supp. 21-4608(c), (d) and (e)].
 - If an offender is sentenced to prison for a crime committed on or after July 1, 1993, while the offender was imprisoned for an offense committed prior to July 1, 1993, and the offender is not eligible for the retroactive application of the KSGA, the new sentence begins when the offender is paroled or reaches the conditional release date on the old sentence, whichever is earlier.
 - If the offender was past the offender's conditional release date at the time the new offense was committed, the new sentence begins when the offender is ordered released by the Prisoner Review Board or reaches the maximum sentence date on the old sentence, whichever is earlier.
 - The new sentence is then served as otherwise provided by law. The period of postrelease supervision will be based on the new sentence. K.S.A. 2011 Supp. 21-6606(e)(2) [formerly K.S.A. 2010 Supp. 21-4608(e)(2)].

When consecutive sentences are imposed for multiple convictions in one case, stemming from multiple counts brought in one charging instrument, the total prison sentence imposed cannot exceed twice the base sentence. This is referred to as the “**double rule**.” K.S.A. 2011 Supp. 21-6819(b)(4) [formerly K.S.A. 21-4720(b)(4)]. This means that the sentencing court is not required to shorten the length of any of the individual non-base sentences given to an offender, as long as the court orders that the total sentence given to the offender is adjusted so that it does not exceed twice the base sentence. The term “base sentence” applies to the base sentence actually imposed, not to the maximum base sentence that could have been imposed according to the sentencing grid. *State v. Snow*, 282 Kan. 323, 341-42 (2006).

If sentences for off-grid and on-grid (sentencing guidelines) convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease period will be based on the off-grid crime. K.S.A. 2011 Supp. 21-6819 (b)(2) [formerly K.S.A. 21-4720(b)(2)].

When an offender is sentenced for multiple convictions of crimes carrying both presumptive prison and nonprison sentences, if the sentence for the primary crime is prison, the entire imprisonment term of the consecutive sentences will be served in prison. K.S.A. 2011 Supp. 21-6819(b)(6) [formerly K.S.A. 21-4720(b)(6)].

The postrelease supervision period will be the longest supervision period imposed for any of the multiple convictions, including the lifetime parole in conjunction with a life sentence imposed for an off-grid crime. Even in the case of consecutive prison sentences, postrelease supervision periods will not be aggregated. In addition, in cases of multiple nonprison sentences, even if the underlying prison sentences are ordered to run consecutively, the nonprison terms shall not be aggregated or served consecutively. However, if the nonprison term is revoked the offender will serve the prison terms consecutively. K.S.A. 2011 Supp. 21-6819(b)(4), (b)(7) and (b)(8) [formerly K.S.A. 21-4720(b)(4), (b)(7) and (b)(8)].

Determining the Base Sentence and Primary Crime

In all sentencing cases involving multiple convictions, the sentencing court must establish the base sentence for the primary crime. The primary crime is determined pursuant to K.S.A. 2011 Supp. 21-6819(b)(2) [formerly K.S.A. 21-4720(b)(2)] as follows:

- The primary crime is generally the crime with the highest severity ranking. However, an off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. The primary on-grid offense shall be sentenced with full criminal history and forms the base sentence for the guidelines sentence. The off-grid sentence remains primary overall, but is added to the guidelines sentence or concurrent to the guidelines sentence, as determined by the court.
- In situations where more than one crime is classified in the same category, the sentencing judge must designate which crime will serve as the primary crime.
 - A presumptive imprisonment crime is primary over a presumptive nonimprisonment crime. Therefore, in the instance of sentencing with the drug grid and nondrug grid, one crime having a presumption of imprisonment and one having a presumption of probation, the crime which presumes imprisonment shall be the primary crime.
 - When the offender is convicted of crimes sentenced on nondrug and drug grids, the primary crime is the one that carries the longest prison term. Therefore, in sentencing with the drug grid and nondrug, both crimes having the same presumption of probation or imprisonment, the primary crime shall be the crime with the longest sentence term.

The base sentence is where the severity level of the primary crime and the criminal history score intersect on the appropriate guidelines grid and shall be the presumed sentence in months. The base sentence will have the full criminal history score assigned. However, non-base sentences will not have criminal history scores applied and shall be calculated in the criminal history I column of the grid according to the severity level of the crime. K.S.A. 2011 Supp. 21-6819(b)(3) and (b)(5) [formerly K.S.A. 21-4720(b)(3) and (b)(5)].

DEPARTURES AND DEPARTURE FACTORS

Either party may file a motion seeking a departure, or the sentencing court may depart on its own motion. Any party filing a motion to depart must state in its motion the type of departure sought and the reasons relied upon. Both the prosecution and defense shall have a reasonable time to prepare for a departure hearing, and the sentencing court shall transmit to both parties, copies of the presentence investigation report prior to the hearing. The State must provide notice of a departure hearing to any victim or the victim's family, and the sentencing court shall review the victim impact statement. Parties may brief the sentencing court in writing and make oral arguments to the court at the hearing. K.S.A. 2011 Supp. 21-6817(a)(1) and (a)(3) [formerly K.S.A. 21-4718(a)(1) and (a)(3)].

Upward durational departure sentencing was affected by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), where K.S.A. 2000 Supp. 21-4716 was found to be "unconstitutional on its face." That version of the statute permitted the judge rather than a jury to find the presence of aggravating factors. In the 2002 Legislative Session both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were amended to provide a bifurcated jury procedure to allow the jury to determine any aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 2011 Supp. 21-6815(b) and 21-6817(b) [formerly K.S.A. 21-4716 and 21-4718].

Facts that would increase the penalty beyond the statutory maximum must now be submitted to a jury. K.S.A. 2011 Supp. 21-6815(b) [formerly K.S.A. 21-4716(b)]. A county or district attorney seeking an upward durational departure sentence must file such motion “not less than 30 days prior to the date of trial unless the trial is to take place in less than 30 days then such motion shall be filed within 7 days from the date of the arraignment.” K.S.A. 2011 Supp. 21-6817(b)(1) [formerly K.S.A. 21-4718(b)(1)]. The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented to the jury during the trial of the matter or in a jury proceeding following the trial. K.S.A. 2011 Supp. 21-6817(b)(2) [formerly K.S.A. 21-4718(b)(2)]. The determination of the aggravating factors shall be by a unanimous jury vote, on a special jury verdict form and based on the reasonable doubt standard. K.S.A. 2011 Supp. 21-6817(b)(4) and (b)(7) [formerly K.S.A. 21-4718(b)(4) and (b)(7)].

Under *State v. Horn*, 291 Kan. 1, 238 P.3d 238 (2010), the Supreme Court identified a defect in the statutory language in K.S.A. 21-4718. The issue concerned the submission of aggravating fact evidence to a jury impaneled only for that purpose, where defendant had only waived his right to trial by jury by his guilty plea, but did not waive his right to trial by jury on the upward departure factors. The Court held that the statutory language as enacted did not enable a court to impanel a jury only to hear aggravating fact evidence. K.S.A. 21-6817 [formerly K.S.A. 21-4718] was enacted and amended during the 2011 Legislative session and now allows the court to conduct a separate jury proceeding on upward durational departure sentencing factors even if the defendant has waived a jury trial on the issue of guilt by entering a guilty or no contest plea. The defendant can waive the right to have such a jury trial on the aggravating factors. The defendant must be informed of the right to have aggravating departure factors determined by a jury in order for such waiver to be valid. *State v. Duncan*, 291 Kan. 467, 243 P. 3d 338 (2010).

At the conclusion of the departure hearing or within 21 days thereafter, the sentencing court shall issue findings of fact and conclusions of law regarding the issues submitted by the parties, and shall enter an appropriate order. K.S.A. 2011 Supp. 21-6817(a)(2) [formerly K.S.A. 21-4718(a)(2)]. Whenever the sentencing court departs from the presumptive guidelines sentence, the court must make findings of fact as to the reasons for departure regardless of whether a hearing is requested. K.S.A. 2011 Supp. 21-6817(a)(4) [formerly K.S.A. 21-4718(a)(4)]. If a factual aspect of the current crime of conviction is an element of the crime or is used to subclassify the crime on the crime severity scale, that factual aspect may be used as an aggravating or mitigating factor to justify a departure from the presumptive sentence only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. K.S.A. 2011 Supp. 21-6815(c)(3) [formerly K.S.A. 21-4716(c)(3)].

In determining aggravating or mitigating circumstances, the sentencing court shall consider:

- any evidence received during the proceeding, including the victim impact statement;
- the presentence investigation report;
- written briefs and oral arguments of either the State or counsel for the defendant; and
- any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable. K.S.A. 2011 Supp. 21-6815(d)(1)-(4) [formerly K.S.A. 21-4716(d)(1)-(4)].

Mitigating Factors - K.S.A. 2011 Supp. 21-6815(c)(1)(A) – (E) and (e)
[formerly K.S.A. 21-4716 (c)(1)(A) - (E) and (e)]

The following nonexclusive list of statutorily enumerated factors may be considered in determining whether substantial and compelling reasons for a downward dispositional departure exist:

- The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction;
- The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor is not sufficient as a complete defense;
- The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor;
- The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse; or
- The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense. K.S.A. 2011 Supp. 21-6815(c)(1)(A) – (E) [formerly K.S.A. 21-4716(c)(1)(A) - (E)].

Subsection (e) provides additional mitigating factors to be considered. It provides that, “Upon motion of the prosecutor stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense, the court may consider such mitigation in determining whether substantial and compelling reasons for a departure exist. In considering this mitigating factor, the court may consider the following:

- the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the prosecutor’s evaluation of the assistance rendered;
- the truthfulness, completeness and reliability of any information or testimony provided by the defendant;
- the nature and extend of the defendant’s assistance;
- any injury suffered, or any danger or risk of injury to the defendant or the defendant’s family resulting from such assistance; and
- the timeliness of the defendant’s assistance.”

For Jessica’s Law departures, the sentencing judge may rely on the same mitigating factors to find substantial and compelling reasons for a departure from the mandatory minimum of Jessica's Law, and to support an additional departure from the default prison sentence pursuant to the sentencing guidelines act. *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

Aggravating Factors - K.S.A. 2011 Supp. 21-6815(c)(2)(A) – (H)
[formerly K.S.A. 21-4716(c)(2)(A) - (H)]

The following nonexclusive list of aggravating factors may be considered in determining whether substantial and compelling reasons for departure exist:

- The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity that was known or should have been known to the offender;
- The defendant’s conduct during the commission of the current offense manifested excessive brutality to the victim in a manner not normally present in that offense;
- The offense was motivated by the defendant’s belief or perception, entirely or in part, of the race, color, religion, ethnicity, national origin or sexual orientation of the victim, whether or not the defendant’s belief or perception was correct;

- The offense involved a fiduciary relationship which existed between the defendant and the victim;
- The defendant, 18 or more years of age, employed, hired, used, persuaded, induced, enticed, or coerced any individual under 16 years of age to commit or assist in avoiding detection or apprehension for commission of any person felony or any attempt, conspiracy or solicitation to commit any person felony regardless of whether the defendant knew the age of the individual was under 16 years of age;
- The defendant's current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender as defined by this section;
- The defendant was incarcerated at the time the crime was committed; or
- The crime involved two or more participants in the criminal conduct, and the defendant played a major role in the crime as the organizer, leader, recruiter, manager, or supervisor.

Additional Aggravating Factors for Drug Grid - K.S.A. 2011 Supp. 21-6816(a)(1) – (4)
[formerly K.S.A. 2010 Supp. 21-4717(a)(1) – (4)]

In addition to the factors listed above, the following aggravating factors which apply to drug felonies committed on or after July 1, 1993, may be considered in determining whether substantial and compelling reasons for departure exist:

- The crime was committed as part of a major organized drug manufacture, production, cultivation or delivery activity. Two or more of the following nonexclusive factors constitute evidence of major organized drug manufacture, production, cultivation or delivery activity:
 - The offender derived a substantial amount of money or asset ownership from the illegal drug sale activity;
 - The presence of a substantial quantity or variety of weapons or explosives at the scene of arrest or associated with the illegal drug activity;
 - The presence of drug transaction records or customer lists that indicate a drug sale activity of major size;
 - The presence of manufacturing or distribution materials such as, but not limited to, drug recipes, precursor chemicals, laboratory equipment, lighting, irrigation systems, ventilation, power-generation, scales or packaging material;
 - Building acquisitions or building modifications including but not limited to painting, wiring, plumbing or lighting which advanced or facilitated the commission of the offense;
 - Possession of large amounts of illegal drugs, or substantial quantities of controlled substances;
 - A showing that the offender has engaged in repeated criminal acts associated with the manufacture, production, cultivation, or delivery of controlled substances.
- The offender possessed illegal drugs:
 - With the intent to sell, which were sold or were offered for sale to a person under 18 years of age; or
 - With the intent to sell, deliver or distribute, or which were sold, or offered for sale in the immediate presence of a person under 18 years of age;
- The offender, 18 or more years of age, employs, hires, uses, persuades, induces, entices, coerces any individual under 16 years of age to violate or assist in avoiding detection or apprehension for violation of any provision of the uniform controlled substances act, or any attempt, conspiracy or solicitation to commit a violation of any provision of the uniform controlled substances act, regardless of whether the offender knew the individual was under 16 years of age;

- The offender was incarcerated at the time the crime was committed. K.S.A. 2011 Supp. 21-6816(a)(1) - (4) [formerly K.S.A. 2010 Supp. 21-4717(a)(1)-(4)]. In determining whether aggravating factors exist as provided in this section, the court shall review the victim impact statement. K.S.A. 2011 Supp. 21-6816(b) [formerly K.S.A. 2010 Supp. 21-4717(b)].

SEX OFFENDERS POSTRELEASE SUPERVISION DEPARTURE

The sentencing court may depart from the normal postrelease supervision period to a period of up to 60 months if it is found that the primary crime of conviction is sexually violent or sexually motivated and the court states on the record substantial and compelling reasons to impose a departure. K.S.A. 2011 Supp. 22-3717(d)(1)(D)(i) and (ii). The sentencing court may order a psychological evaluation be prepared and the recommended program be completed by the offender. The department of corrections or the Prisoner Review Board shall ensure that court ordered sex offender treatment be carried out. K.S.A. 2011 Supp. 22-3717(d)(1)(D)(iv).

DURATIONAL AND DISPOSITIONAL DEPARTURES

When imposing a departure sentence, the sentencing court should begin with the grid block corresponding to the severity level of the crime of conviction and the offender's criminal history. A sentence that is an upward durational departure cannot exceed twice the maximum presumptive sentence. There is no limit on a downward durational departure. K.S.A. 2011 Supp. 21-6818(b) [formerly K.S.A. 2010 Supp. 21-4719(b)].

A downward departure from an off-grid Jessica's Law sentence must first depart to a guidelines sentence within the grid box reflecting the offender's criminal history and the severity level of the crime when the victim's age and the offender's age are not considered. If the sentencing judge wishes to depart from the presumptive guidelines sentence, the court must also consider whether substantial and compelling factors exist to justify a second departure from the presumptive sentence. *State v. Jolly*, 291 Kan. 842, 249 P.3d 421 (2011) and *State v. Spencer*, 291 Kan. 796, 248 P.3d 256 (2011).

The sentencing court may also depart from the presumptive disposition in the case by sentencing an offender for whom the presumptive sentence is probation to prison (upward dispositional departure), or by sentencing an offender for whom the presumptive sentence is prison to a nonprison sanction (downward dispositional departure). See K.S.A. 2011 Supp. 21-6818(c) and (d) [formerly K.S.A. 2010 Supp. 21-4719(c) and (d)]. When the sentencing judge imposes a prison sentence as a dispositional departure, the term of imprisonment shall not exceed the maximum duration of the presumptive imprisonment term. If an upward dispositional departure is combined with an upward durational departure, the sentencing court must define separate substantial and compelling reasons for both departures. See K.S.A. 2011 Supp. 21-6818(c)(2) [formerly K.S.A. 2010 Supp. 21-4719(c)(2)]. However, this requirement does not apply in the case of a downward dispositional and durational departure combination.

K.S.A. 2011 Supp. 21-6818(a) [formerly K.S.A. 2010 Supp. 21-4719(a)] provides that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to no less than 50% of the center of the range of the sentence for such crime.

JURY TRIAL PROCEDURES WHEN STATE SEEKS AN UPWARD DURATIONAL DEPARTURE

- If the State seeks an upward durational departure sentence, the aggravating factor(s) must first be stipulated to by defendant or proven to a unanimous jury beyond a reasonable doubt. In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), our Supreme Court held that facts (aggravators) that would increase the penalty beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. The Legislature then amended K.S.A. 21-4716 [now K.S.A. 2011 Supp. 21-6815(b)] to provide a statutory framework for such a jury proceeding.
- A County or District Attorney seeking an upward durational departure must provide notice 30 days prior to the date of trial or, within 7 days from the date of the arraignment if the trial is to take place in less than 30 days from the date of the arraignment. K.S.A. 2011 Supp. 21-6817(b)(1) [formerly K.S.A. 21-4718(b)(1)]. The court shall determine if the presentation of the evidence regarding the aggravating factors shall be presented during the trial of the matter or in the jury proceeding following the trial. K.S.A. 2011 Supp. 21-6817(b)(2) [formerly K.S.A. 21-4718(b)(2)].
- The jury shall determine, based on the reasonable doubt standard, whether aggravating factors exist that may serve to enhance the maximum sentence. If one or more aggravating factors are found to exist, by a unanimous jury vote, such factors shall be reported to the court on a special jury verdict form. K.S.A. 2011 Supp. 21-6817(b)(4) and (b)(7) [formerly K.S.A. 21-4718(b)(4) and (b)(7)].

DEPARTURE AND CONSECUTIVE SENTENCING COMBINATION

The following shall apply for a departure from the presumptive sentence based on aggravating factors within the context of consecutive sentences:

- The court may depart from the presumptive limits for consecutive sentences only if the judge finds substantial and compelling reasons to impose a departure sentence for any of the individual crimes being sentenced consecutively. K.S.A. 2011 Supp. 21-6819(c)(1) [formerly K.S.A. 21-4720(c)(1)].
- When a departure sentence is imposed for any of the individual crimes sentenced consecutively, the imprisonment term of that departure sentence shall not exceed twice the maximum presumptive imprisonment term that may be imposed for that crime. K.S.A. 2011 Supp. 21-6819(c)(2) [formerly K.S.A. 21-4720(c)(2)].
- The total imprisonment term of the consecutive sentences, including the imprisonment term for the departure crime, shall not exceed twice the maximum presumptive imprisonment term of the departure sentence following aggravation. This, referred to as the double-double rule, means that the total prison term of the consecutive sentences must not be more than twice the upward departure sentence. K.S.A. 2011 Supp. 21-6819(c)(3) [formerly K.S.A. 21-4720(c)(3)].

Examples

An offender is convicted of kidnapping (severity level 3), aggravated burglary (severity level 5), and theft with a loss of at least \$1,000 but less than \$25,000 (severity level 9). The offender has one prior person felony conviction placing him in criminal history Category D. If the jury determines, based on the reasonable doubt standard, that substantial and compelling reasons exist to impose an upward durational departure sentence for the kidnapping, that departure may be imposed in conjunction with the imposition of consecutive sentences for the remaining convictions of aggravated

burglary and theft. Both the limits on the total consecutive term and the limits applicable to upward durational departure sentences apply.

The sentencing court begins by establishing a base sentence for the primary sentence. In this fact pattern, the most serious crime of conviction is the kidnapping, with a presumed imprisonment sentence of 94 months, which becomes the base sentence. The two remaining convictions at criminal history Category I have presumptive sentences of 32 and 6 months respectively. (If the sentencing court wished only to sentence these offenses consecutively, the total sentence could not aggregate to a sum greater than two times the base without a durational departure sentence. In this hypothetical case, the greatest aggregate consecutive sentence would be 2×94 , or 188 months. Here, the total sum of $94 + 32 + 6$ would be 132 months, a consecutive sentence clearly within the limit of twice the base sentence.)

Assume that the jury establishes a finding for an upward durational departure sentence for the kidnapping conviction based on the presence of an aggravating factor and the court imposes three consecutive sentences for the three offenses in this case.

Base sentence: Kidnapping at Maximum Presumptive Sentence = 100 months

(Kidnapping at severity level 3, criminal history "D" on the nondrug grid)

Other sentences: Aggravated Burglary and Theft = 32 and 6 months.

(Aggravated Burglary at severity level 5, criminal history "I" and
Theft at severity level 9, criminal history "I" on the nondrug grid)

The base sentence may be enhanced to a maximum departure length of up to 200 months, or two times the maximum presumptive sentence. This is the standard rule for any departure sentence. In addition, the total imprisonment term of the consecutive sentences, including the departure term, shall not exceed twice the departure of the enhanced sentence. Therefore, the aggregate consecutive sentence in this example cannot exceed 2×200 , or 400 months. The sum of $200 + 32 + 6$, or 238 months is well within the limit of 400 months.

The sentencing court may choose to depart and impose a longer sentence for the aggravated burglary and theft if independent substantial and compelling reasons exist to justify those departures. The aggregate consecutive sentence becomes $200 + 64 + 12$, or 276 months, which is still within the limit of 400 months. This sentence would represent a durational departure sentence within a consecutive sentence context, and the limits on the total duration of such a sentence are sometimes referred to as the "**double-double rule**." The application of the so-called "**double-double rule**" allows a sentencing court considerable discretion in fashioning a sentence for exceptional cases that warrant both an upward durational departure and consecutive sentencing. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan. App.2d 747, 195 P.3d 282 (2008).

REPORTING DISPOSITIONS TO THE KANSAS BUREAU OF INVESTIGATION AND THE KANSAS SENTENCING COMMISSION

The sentencing guidelines Journal Entry of Judgment form approved by the Kansas Sentencing Commission must be completed for each felony conviction for a crime committed on or after July 1, 1993. K.S.A. 2011 Supp. 22-3426(d). The court shall forward a signed copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2011

Supp. 21-6813 [formerly K.S.A. 2010 Supp. 21-4714] to the Kansas Sentencing Commission within 30 days after sentencing. K.S.A. 2011 Supp. 22-3439(a).

For crimes committed on or after July 1, 1993, when a convicted person is revoked for a probation violation, a Journal Entry of Revocation form as approved by the Kansas Sentencing Commission shall be completed by the court. K.S.A. 2010 Supp. 22-3426a. For probation revocations that result in the defendant's imprisonment in the custody of the Department of Corrections, the court shall forward a signed copy of the Journal Entry of Revocation to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 2011 Supp. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2011 Supp. 74-9101(b)(5).

The court shall insure that information concerning dispositions for all other felony probation revocations based upon crimes committed on or after July 1, 1993, and for all class A and B misdemeanor crimes and assault as defined in K.S.A. 2011 Supp. 21-5412 [formerly K.S.A. 21-3408], committed on or after July 1, 1993, is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of that final disposition. K.S.A. 2011 Supp. 22-3439(c).

Likewise in the municipal courts, the municipal judge shall ensure that information concerning dispositions of city ordinance violations that result in convictions comparable to class A and B misdemeanors under Kansas criminal statutes is forwarded to the Kansas Bureau of Investigation central repository on a form or in a format approved by the Kansas Attorney General within 30 days of final disposition. K.S.A. 2011 Supp. 12-4106(e).

The Kansas Sentencing Commission staff will review felony Journal Entries and will notify the sentencing court in writing when a possible illegal sentence has been identified. The information gathered from the sentencing guidelines forms provides a database to assess the impact of the sentencing guidelines on state correctional resources, the impact of proposed revisions to the sentencing guidelines, and improves the availability and reliability of criminal history record information.

CHAPTER VII: APPEALS

APPELLATE REVIEW PRINCIPLES – K.S.A. 2011 SUPP. 21-6820 [FORMERLY K.S.A. 21-4721]

A departure sentence is subject to appeal by the defendant or the state, to the appellate courts in accordance with rules adopted by the Supreme Court. K.S.A. 2011 Supp. 21-6820(a) [formerly K.S.A. 21-4721(a)]. Pending review of the sentence, the sentencing court, or the appellate court may order the defendant confined or placed on conditional release, including bond. K.S.A. 2011 Supp. 21-6820(b) [formerly K.S.A. 21-4721(b)]. On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

- Any sentence within the presumptive range in the appropriate grid block of the sentencing grid; or
- Any sentence resulting from a plea agreement between the state and the defendant as accepted by the sentencing court on the record. K.S.A. 2011 Supp. 21-6820(c) [formerly K.S.A. 21-4721(c)].

Appellate review for a departure sentence is limited to whether the court's findings of fact and reasons justifying departure are supported by evidence on the record and constitutes substantial and compelling reasons for departure. K.S.A. 2011 Supp. 21-6820(d) [formerly K.S.A. 21-4721(d)]. A defendant's allegation that there was a constitutional error in an individual presumptive sentence does not grant the appellate court jurisdiction to review the sentence. *State v. Huerta*, 291 Kan. 831, 247 P.3d 1043 (2011). In any appeal, the appellate court may review a claim that:

- A departure sentence resulted from partiality, prejudice, oppression or corrupt motive;
- The sentencing court erred in including or excluding a prior conviction or juvenile adjudication for criminal history scoring purposes; or
- The sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. K.S.A. 2011 Supp. 21-6820(e) [formerly K.S.A. 21-4721(e)].

The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. K.S.A. 2011 Supp. 21-6820(f) [formerly K.S.A. 21-4721(f)]. In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case, the court shall follow all of the provisions of K.S.A. 2011 Supp. 21-6819 [formerly K.S.A. 21-4720] concerning the sentencing of multiple conviction cases. K.S.A. 2011 Supp. 21-6819(b)(5) [formerly K.S.A. 21-4720(b)(5)].

The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors. K.S.A. 2011 Supp. 21-6820(i) [formerly K.S.A. 21-4721(i)].

CHAPTER VIII: COMMUNITY SANCTIONS AND POSTRELEASE SUPERVISION

POSTRELEASE SUPERVISION

Upon completion of the prison portion of the imposed sentence, most inmates will be released to serve a term of postrelease supervision, plus the amount of good time earned and retained while imprisoned. K.S.A. 2011 Supp. 22-3717. A table of postrelease terms, in number of months, and the effective date of those changes, is included below:

Severity Level	On or after 7/1/93 (SB 423)	On or after 4/20/95 (SB 360)	On or after 7/1/00 (SB 323)	On or after 11/1/03 (SB 123)
1 Nondrug	24	36	36	36
2 Nondrug	24	36	36	36
3 Nondrug	24	36	36	36
4 Nondrug	24	36	36	36
5 Nondrug	24	36	24	24
6 Nondrug	24	36	24	24
7 Nondrug	12	24	12	12
8 Nondrug	12	24	12	12
9 Nondrug	12	24	12	12
10 Nondrug	12	24	12	12
1 Drug	24	36	36	36
2 Drug	24	36	36	36
3 Drug	24	36	24	24
4 Drug	12	24	12	12

However, under the language found in K.S.A. 1993 Supp. 22-3717, for crimes committed prior to April 20, 1995, postrelease supervision lengths, for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, were for a period of 24 months. Despite the retroactive application of the changes made to postrelease supervision periods under K.S.A. 22-3717 in the 2000 Kansas Legislative Session, it appears that offenders sentenced for severity levels 1 through 4 of the nondrug grid and severity levels 1 and 2 of the drug grid, for crimes committed prior to April 20, 1995, continue to receive the postrelease supervision periods applicable for those crimes at the time the crimes were committed.

In cases involving multiple convictions, the crime carrying the longest postrelease supervision term will determine the period of supervision for offenders ordered to serve more than one sentence, whether concurrent or consecutive. K.S.A. 2011 Supp. 22-3717(d)(1)(F).

If an offender is convicted of a sexually motivated crime, as defined in 2011 Supp. K.S.A. 22-3717(d)(2), the sentencing court, based upon substantial and compelling reasons stated on the record, may depart from the prescribed postrelease supervision period and place the offender on postrelease supervision for a maximum period of 60 months. This is considered a departure and is subject to appeal. K.S.A. 2011 Supp. 22-3717(d)(1)(D)(i) and (ii). The Prisoner Review Board may, in its

discretion, grant early discharge from this extended postrelease supervision period upon completion of any treatment programs and completion of the longest presumptive postrelease supervision period associated with any of the crimes for which the prison sentence was being served. K.S.A. 2011 Supp. 22-3717(d)(1)(D)(vi).

An offender convicted of a sexually violent crime, as defined in K.S.A. 2011 Supp. 22-3717(d)(1)(G), committed on or after July 1, 2006, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life.

Offenders convicted of crimes deemed sexually violent or sexually motivated must register with local law enforcement agencies according to the habitual sex offender registration act, K.S.A. 2011 Supp. 22-4901 through K.S.A. 22-4910, and amendments thereto. K.S.A. 2011 Supp. 22-3717(d)(1)(D)(vii).

The Prisoner Review Board reviews release plans. However, the Board is unable to make any changes regarding release dates for offenders sentenced under the KSGA. K.S.A. 2011 Supp. 22-3717(i).

Offenders convicted of certain child sex offenses wherein the offender was 18 years of age or older and the victim was less than 14 years of age, committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Prisoner Review Board. When the Prisoner Review Board orders the parole of an inmate pursuant to this subsection, the Board shall order, as a condition of parole, that the inmate be electronically monitored for the duration of the inmate's natural life. K.S.A. 2011 Supp. 22-3717(u). The court does not have the authority to order postrelease supervision electronic monitoring for such offenses. *State v. Jolly*, 291 Kan. 842, 249 P.3d 421 (2011).

The Prisoner Review Board determines release of offenders sentenced to other off-grid sentences. Discharge from parole is also determined by the Prisoner Review Board, but generally an offender may not be discharged from parole within a period of less than one year after release from prison. K.S.A. 22-3722.

If an offender is revoked from a nonprison sanction and a prison sentence is imposed, in most cases the offender is not required to complete a postrelease supervision period. This does not apply to offenders sentenced to a nonprison sanction pursuant to a dispositional departure, whose offense falls within a border box, offenders sentenced for a sexually violent crime or a sexually motivated crime, whose nonprison sanction was revoked as a result of a conviction for a new misdemeanor or felony offense, for offenders sentenced to serve a sentence for another felony offense that is not excluded from postrelease supervision. This subsection is applied retroactively. K.S.A. 2011 Supp. 22-3716(e) and K.S.A. 22-3716a(e).

VIOLATIONS OF CONDITIONS OF RELEASE - PROBATION OR POSTRELEASE SUPERVISION

Probation

Notwithstanding the provisions of any other law to the contrary, an offender whose nonprison sanction is revoked and a term of imprisonment imposed pursuant to either the sentencing guidelines grid for nondrug or drug crimes shall not serve a period of postrelease supervision upon the completion of the prison portion of that sentence. However, this does not apply to:

- Offenders sentenced to a nonprison sanction pursuant to a dispositional departure;

- Offenders whose offense falls within a border box of either the sentencing guidelines grid for nondrug or drug crimes;
- Offenders sentenced for a "sexually violent crime" or a "sexually motivated crime" as defined by K.S.A. 2011 Supp. 22-3717, and amendments thereto;
- Offenders whose nonprison sanction was revoked as a result of a conviction for a new misdemeanor or felony offense; or
- Offenders who are serving or are to begin serving a sentence for any other felony offense that is not excluded from postrelease supervision by this subsection on the effective date of this subsection. K.S.A. 2011 Supp. 22-3716(e).

When an offender is sentenced for a felony committed while the offender was on felony probation (or other felony nonprison status), a consecutive sentence is generally mandated, and the sentencing court may sentence the offender to prison for the new offense even if that offense otherwise presumes a nonprison sentence. This is not considered a departure and does not require additional substantial and compelling circumstances on the record. K.S.A. 2011 Supp. 21-6604(f) [formerly K.S.A. 2010 Supp. 21-4603d(f)] and K.S.A. 2011 Supp. 22-3716(b).

Postrelease Supervision

For crimes committed before April 20, 1995, a finding of a technical violation of the conditions of postrelease supervision will result in imprisonment for a period not to exceed 90 days from the date of the final revocation hearing; for crimes committed on or after April 20, 1995, a technical violation will result in imprisonment for six months and such time may be reduced by not more than 3 months based upon the inmate's conduct, work and program participation during the imprisonment period. K.S.A. 2010 Supp. 75-5217(b). If the violation results from a conviction of a new felony, upon revocation of postrelease supervision, the offender will serve the entire remaining balance of the postrelease supervision period in prison even if the new conviction does not result in a new prison term, including the amount of good time which had been earned before release. K.S.A. 2010 Supp. 75-5217(c). If an offender is returned to prison with a new misdemeanor conviction, upon revocation, the offender shall serve a period of confinement to be determined by the Prisoner Review Board, which shall not exceed the remaining balance of the period of postrelease supervision. K.S.A. 2010 Supp. 75-5217(d).

Conversion of Sentence for a Crime Committed After July 1, 1993, But Before March 24, 1994

Prior to March 24, 1994, if an offender was sentenced to prison for a crime committed after July 1, 1993, and while the offender was on parole or conditional release for a crime committed prior to July 1, 1993, the old sentence was to be converted into a determinate sentence to run consecutive to the new sentence as follows:

- Twelve months for class C, D or E felonies or the conditional release date whichever is shorter; and
- Thirty-six months for class A or B felonies or the conditional release date whichever is shorter.

The converted sentence for crimes committed prior to July 1, 1993, was to be aggregated with the new consecutive guidelines sentence. See K.S.A. 1993 Supp. 22-3717(f)(1) and (2).

Conversion of Sentence for a Crime Committed After March 24, 1994

On or after March 24, 1994, if an offender is sentenced to prison for a crime committed on or after July 1, 1993, while on probation, parole, conditional release or in a community corrections program, for a crime committed prior to July 1, 1993, and the offender is not eligible for retroactive application

of the KSGA under K.S.A. 21-4724, the new sentence will not be aggregated with the old sentence. Instead, the offender will not begin to serve the new sentence until he or she is paroled, or reaches the conditional release date on the old sentence. K.S.A. 2011 Supp. 22-3717(f).

If the offender was past the conditional release date at the time the new offense was committed, the new sentence shall begin when the offender is ordered released by the Prisoner Review Board or reaches the maximum expiration date of the old sentence, whichever is earlier. Then the offender will begin to serve the new sentence, which will also govern the postrelease supervision term. However, if the old sentence was life or an indeterminate term with life as the maximum, the offender will remain under supervision for life, or until discharged by the Prisoner Review Board. K.S.A. 2011 Supp. 22-3717(f).

CHAPTER IX: RETROACTIVITY

RETROACTIVE APPLICATION OF SENTENCING GUIDELINES

The retroactive provision of the KSGA applies to offenders incarcerated who would have been considered presumptive probation candidates had they been sentenced as if their crimes occurred on or after July 1, 1993, or who would have been placed in grid blocks 5-H, 5-I or 6-G of the sentencing guidelines grid for nondrug crimes, had they been sentenced as if their crimes occurred on or after July 1, 1993. K.S.A. 21-4724(b)(1). For offenders sentenced before July 1, 1993, the Kansas Department of Corrections (KDOC) was required to assess each offender's possible eligibility for retroactive application of the KSGA by determining the severity level of the crime(s) of conviction as if the crime(s) had occurred on or after July 1, 1993, and the offender's criminal history. K.S.A. 21-4724(c)(1).

Once an offender was determined to be eligible for the retroactive application of the sentencing guidelines, the KDOC was to issue a report indicating such to the offender, prosecutor, and the sentencing court. K.S.A. 21-4724(c). The criminal history classification determined by KDOC was to be deemed correct unless an objection was filed by either the offender or the prosecution within the 30 days provided to request a hearing. K.S.A. 21-4724(c)(4). If a hearing was requested within the 30 days, the parties could challenge the KDOC's determination of the crime severity or the criminal history, or seek a departure sentence if the offender was eligible for conversion of the sentence to a guidelines sentence. K.S.A. 21-4724(d).

If no hearing was requested, the sentence was converted and the offender was released after serving the midpoint sentence of the range in the applicable sentencing guidelines grid block. K.S.A. 21-4724(d)(1). If a hearing was requested, the sentencing court determined whether the offender was eligible for conversion to a guidelines sentence and the appropriate duration of that sentence, within the limits imposed by the sentencing guidelines. K.S.A. 21-4724(d)(2). The presence of the offender in person at the hearing was not required but counsel had to be appointed. K.S.A. 21-4724(d)(4), (5). No sentence could be increased through retroactive application of the guidelines. K.S.A. 21-4724(e).

For those offenders who committed crimes prior to July 1, 1993, but who were sentenced after that date, the sentencing court was to impose a sentence pursuant to the law in effect before July 1, 1993. However, the sentencing court was also required to compute the appropriate sentence had the offender been sentenced pursuant to the KSGA. K.S.A. 21-4724(f).

K.S.A. 21-4724(b)(1) also contains a provision concerning the modification of sentences for individuals convicted of pre-July 1, 1993, crimes that, had the crime been committed after July 1, 1993, would have been classified in grid blocks 3-H, or 3-I of the drug grid. K.S.A. 21-4724(b)(1) provides that such drug grid 3-H or 3-I crimes may be converted to KSGA determinate sentences "*pursuant to the provisions of subsection (c) of K.S.A.21-4705, and amendments thereto.*" This provision created the commonly referred to "small sale" exception for marijuana which allowed for the conversion of sentences equivalent to 3-H or 3-I drug grid sentences for only those individuals who fit within the "small sale" of marijuana definition that was found at K.S.A. 21-4705(c). See *State v. Hackler*, 21 Kan. App. 2d 325, 900 P.2d 241 (1995). However, the changes made in K.S.A. 1996 Supp. 21-4705 eliminated the definition of a "small sale" of marijuana exception from subsection (c)

of the statute, and thus effectively eliminated the possibility of having a pre-guidelines conviction that would equate to a 3-H or 3-I drug grid conviction converted to a determinate sentence.

2000 RETROACTIVITY PROVISIONS

Legislation passed during the 2000 Kansas Legislative Session, found at K.S.A. 2000 Supp. 21-4611(d), also contained provisions with retroactive application for sentences under the Kansas Sentencing Guidelines Act. For a full description of those provisions, please see the **“TIME LINE OF CERTAIN IMPORTANT EVENTS RELATED TO THE KSGA”** located on the KSC website at www.kansas.gov/ksc.

CHAPTER X: POINTS OF INTEREST ABOUT THE GUIDELINES

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE SENTENCING COURT

CRIME SEVERITY AND CRIMINAL HISTORY CONSTRAIN SENTENCING DECISIONS

The KSGA provides a grid-based sentencing scheme dependent on two controlling factors: the crime severity level and the criminal history of the offender. The drug and nondrug sentencing grids indicate the range of sentence lengths (duration) presumed by statute to be appropriate for an offender. Further, they indicate whether the defendant should be presumed by statute to be granted probation or remanded to prison (disposition). The sentencing court has discretion to grant a sentence other than that presumed by the grid box, a departure sentence, if the court finds substantial and compelling reasons to do so. If the offender's case falls in a border box, the length of sentence is still presumed under the KSGA, but the sentencing court, without finding substantial and compelling reasons, can grant an optional nonprison sentence of probation. An "optional nonprison sentence" is a sentence which the court may impose, in lieu of the presumptive sentence, upon making the following findings on the record:

- An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
- the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or
- the nonprison sanction will serve community safety interests by promoting offender reformation.

Any decision made by the court regarding the imposition of an optional nonprison sentence shall not be considered a departure and shall not be subject to appeal.

GOOD TIME

The terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA are of a pre-established, binding duration. In other words, the offender will actually serve the sentence imposed by the sentencing court. The offender may earn good time in an amount no greater than:

- 20% for crimes committed on or after July 1, 1993 and prior to April 20, 1995;
- 15% for crimes committed on or after April 20, 1995; or,
- 20% for crimes of drug severity level 3 or 4 or, nondrug severity level 7, 8, 9, or 10, committed on or after January 1, 2008. K.S.A. 2011 Supp. 21-6806(a) and 21-6821(a)(2) [formerly K.S.A. 21-4706(a) and 21-4722(a)(2)].

Although good time serves to reduce the portion of the sentence that must be served in prison, the amount of good time earned is added to the period of postrelease supervision, so that the entirety of the term will not be affected or reduced. K.S.A. 2011 Supp. 21-6821(b) [formerly K.S.A. 21-4722(b)].

In presumptive imprisonment cases, the sentencing court shall pronounce the complete sentence which shall include the prison sentence, the maximum potential reduction to such sentence as a result of good time and the period of postrelease supervision at the sentencing hearing. Failure to pronounce

the period of postrelease supervision shall not negate the existence of such period of postrelease supervision. K.S.A. 2011 Supp. 21-6804(e)(2) [formerly K.S.A. 2010 Supp. 21-4704(e)(2)].

GUIDELINES LEAVE ROOM FOR PROPERLY JUSTIFIED EXERCISE OF DISCRETION

The KSGA offers an objective approach to sentencing without placing undue limitations on the discretion of the sentencing court. The guidelines establish presumptive rather than mandatory sentences. Upon motion of either party or upon its own motion, the sentencing court may depart from the presumed disposition established by the guidelines. The sentencing court may similarly depart upward or downward from the presumptively appropriate duration of any prison term established by the sentencing guidelines. Such departures must be supported on the record by substantial and compelling reasons, which may include aggravating or mitigating circumstances specifically enumerated in non-exclusive lists of departure factors found within the sentencing guidelines provisions.

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departure sentences. Both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 were subsequently amended to correct the problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. K.S.A. 2011 Supp. 6815(b) [formerly K.S.A. 21-4716]. Evidence of aggravating circumstances is either presented during the trial of the matter or in a bifurcated jury proceeding following the trial or plea. K.S.A. 2011 Supp. 21-6817(b)(2) [formerly K.S.A. 21-4718].

Certain offenses (i.e., those that fall into border boxes on the guidelines grids) allow the sentencing court the option to impose a nonprison sentence without making a departure. However, the sentencing court also has the discretion to decide whether sentences should run concurrently or consecutively. K.S.A. 2011 Supp. 21-6819 [formerly K.S.A. 21-4720].

FORMS HELP MAKE A RECORD

In order to assist the sentencing court in making a complete record of all aspects of the sentencing proceedings, the Journal Entry of Judgment form, approved by the Kansas Sentencing Commission, facilitates inclusion of all requisite information and findings for the record in a concise and efficient manner. Pursuant to K.S.A. 2011 Supp. 22-3426, the journal entry must be on a form approved by the Kansas Sentencing Commission and this form must be used for all felony cases sentenced on or after July 1, 1993. The sentencing court must forward a copy of the Journal Entry of Judgment, attached together with the Presentence Investigation Report to the Kansas Sentencing Commission within thirty (30) days of the sentencing. K.S.A. 2011 Supp. 22-3439(a).

Each Journal Entry of Probation Revocation Hearing must also be on a form approved by the Kansas Sentencing Commission and be sent to the Kansas Sentencing Commission within 30 days of final disposition. K.S.A. 2010 Supp. 22-3426a(c) and K.S.A. 2011 Supp. 22-3439(b). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing must still be submitted to the Kansas Sentencing Commission. K.S.A. 2011 Supp. 74-9101(b)(5). Information for felony probation revocations based upon crimes committed on or after July 1, 1993 (and all class A and class B misdemeanor crimes and assault as defined in K.S.A. 21-3408, prior to its repeal, or subsection (a) of K.S.A. 2011 Supp. 21-5412 committed on or after July 1, 1993), must also be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. See K.S.A. 2011 Supp. 22-3439(c).

COURT NOT BOUND BY PLEA AGREEMENTS

The sentencing court remains free to accept or reject any plea agreement reached by the parties that is otherwise authorized by the KSGA. However, the court may impose up to the maximum sentence provided in the applicable grid box, even if the parties have recommended a lesser sentence. While plea bargaining may not be used to exact a promise from the prosecutor not to allege prior convictions that will enhance the crime severity level of the offense, or will affect the determination of the offender's criminal history category, plea bargaining is otherwise permissible. K.S.A. 2011 Supp. 21-6807(b)(4) and 21-6812 [formerly K.S.A. 21-4707(b)(4) and K.S.A. 2010 Supp. 21-4713].

The offender may enter a plea to the charged offense, or to a lesser or related charge in return for the dismissal of other charges or counts, a recommendation for a particular sentence within the appropriate sentencing range on the grid, a recommendation for a departure sentence where departure factors exist and are stated on the record, an agreement that a particular charge or count will or will not be filed, or any other promise not prohibited by law. K.S.A. 2011 Supp. 21-6807(b)(4) and 21-6812 [formerly K.S.A. 21-4707(b)(4), K.S.A. 2010 Supp. 21-4713] and K.S.A. 2010 Supp. 22-3210.

INFORMING THE OFFENDER OF THE POSSIBLE PENALTIES WHEN ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA

Whether the sentencing court accepts or rejects any proposed plea agreement, the court will often be making a decision whether to accept a plea of guilty or no contest from the offender before coming into possession of all criminal history information that is required for imposition of sentence. Nevertheless, the sentencing court is still able to advise the offender of the sentencing consequences of the plea by simply informing the offender of the entire range of sentences provided by the grid for the severity level of the crime to which the plea is being entered. K.S.A. 2011 Supp. 21-6807 [formerly K.S.A. 21-4707] and K.S.A. 2010 Supp. 22-3210(a)(2).

While subsequently discovered prior convictions cannot then be used to enhance the severity level of the crime to which a plea has been accepted, they can be counted in the offender's criminal history. K.S.A. 2011 Supp. 21-6807(c)(4) [formerly K.S.A. 21-4707(c)(4)].

PRESENTENCE INVESTIGATION REPORT IS MANDATORY

Another benefit of the KSGA for the sentencing court is the fact that a Presentence Investigation Report is mandatory, which ensures that the court will be in possession of the most complete criminal history information involving the offender as is available. K.S.A. 2011 Supp. 21-6813(a) [formerly K.S.A. 2010 Supp. 21-4714(a)].

CHALLENGES TO CRIMINAL HISTORY; OTHER HEARINGS

If the offender does not agree in open court to the criminal history as reflected in the Criminal History Worksheet/Presentence Investigation Report and gives written notice of any errors contained there, the prosecutor will have to prove the disputed elements by a preponderance of the evidence at the hearing, and the sentencing court is authorized to give the prosecution reasonable time to produce such evidence. The offender must specify the exact nature of any alleged error if he/she objects to his/her criminal history worksheet. K.S.A. 2011 Supp. 21-6814(c) [formerly K.S.A. 2010 Supp. 21-4715(c)].

If any party seeks imposition of a departure sentence, a hearing on the matter must be held, and the parties must be given adequate time to prepare and present their arguments regarding the proposed departure. Written arguments may be submitted and oral arguments presented, and the sentencing court must review any victim impact statement. Copies of the Presentence Investigation Report must be provided to the parties prior to the hearing. The sentencing court will have up to twenty-one (21) days to rule. K.S.A. 2011 Supp. 21-6817(a)(1) and (a)(2) [formerly K.S.A. 21-4718(a)(1), and (2)]. Any departure from the presumptive sentence must be supported by substantial and compelling reasons stated on the record. K.S.A. 2011 Supp. 21-6815(a), 21-6819(c)(1), 21-6816(a) and 21-6818(c)(2) [formerly K.S.A. 21-4716(a), and 21-4720(c)(1), and K.S.A. 2010 Supp. 21-4717(a) and 21-4719(c)(2)].

APPEALS

Any sentence imposed by the sentencing court which is within the presumptive sentencing range provided for the crime on the proper grid, or which results from a plea agreement between the parties and is approved by the sentencing court on the record, is generally not appealable unless the determination of the severity level of the crime, or the criminal history of the offender are brought into question. A departure sentence is appealable to the extent that the reasons justifying the departure must be found to be supported by the evidence in the record and are substantial and compelling. Otherwise, review of departure sentences on appeal is limited to claims that the sentence resulted from partiality, prejudice, oppression, or corrupt motive. K.S.A. 2011 Supp. 21-6820 [formerly K.S.A. 21-4721].

EXTENDED JURISDICTION JUVENILE CASES

Under K.S.A. 2011 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2011 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

SUGGESTED SENTENCING PROTOCOL UNDER THE KSGA

1. ANNOUNCE THE CASE.

2. HAVE COUNSEL STATE THE APPEARANCES FOR THE RECORD.

3. GIVE AN OVERVIEW OF HOW THE DEFENDANT WAS FOUND GUILTY.

- Guilty plea
- No contest plea
- Bench trial
- Jury trial

4. CONFIRM THAT EACH PARTY HAS BEEN SUPPLIED WITH A COPY OF THE PRESENTENCE INVESTIGATION REPORT (PSI).

5. ASK EACH PARTY IF THERE IS A CHALLENGE TO THE CRIMINAL HISTORY.

- Require the parties to answer on the record.
- Address the defendant personally and ask whether he acknowledges the accuracy of the criminal history set out in the Criminal History Worksheet. K.S.A. 2011 Supp. 21-6814 [formerly K.S.A. 2010 Supp. 21-4715].
- If there are challenges to the criminal history, take up each challenge and rule on each challenge. The offender must specify the exact nature of any alleged error if he or she objects to his or her criminal history worksheet.
 - Criminal history shall be established by a preponderance of the evidence. The burden of proof is on the State.
 - A certified or authenticated copy of a Journal Entry is sufficient proof of a prior offense unless the defendant denies he or she is the person named. See *State v. Staven*, 19 Kan. App. 2d 916, 881 P.2d 573 (1994).
 - If time to challenge the criminal history was not available prior to the sentencing hearing, additional time must be provided. See *State v. Hankins*, 19 Kan. App. 2d 1036, 880 P.2d 271 (1994).
 - Burden is on prosecution when defendant objects to criminal history classification. See *State v. Schow*, 287 Kan. 529 (2008). However, if criminal history has previously been established, and the offender later challenges the established criminal history, the burden shifts to the defendant pursuant to 2009 Legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, now at K.S.A. 2011 Supp. 21-6814.
- If changes are made to the defendant's criminal history, the court should also make the changes on the Criminal History Worksheet.
- If the defendant's criminal history score is modified as the result of a challenge, confirm that the parties are prepared for sentencing and, if so, proceed.

6. STATE THE PRIMARY OFFENSE OF CONVICTION, THE CRIMINAL HISTORY SCORE, THE RANGE OF IMPRISONMENT SENTENCE LENGTHS (AGGRAVATED, STANDARD, MITIGATED) IN THE APPLICABLE GRID BOX, ANY GRID BOX PRESUMPTION (IMPRISONMENT, PROBATION, BORDER BOX), ANY SPECIAL RULE THAT AFFECTS THE GRID BOX PRESUMPTION, THE PERIOD OF

POSTRELEASE SUPERVISION FOLLOWING RELEASE FROM IMPRISONMENT, THE APPLICABLE PERCENTAGE OF GOOD TIME CREDIT THAT CAN BE EARNED, THE LENGTH OF THE PERIOD OF PROBATION, IF GRANTED, AND THE AGENCY TO SUPERVISE SUCH PROBATION.

7. IF THERE ARE ADDITIONAL FELONY OFFENSES, FOR EACH SUCH OFFENSE, IN ORDER OF DECREASING SEVERITY, APPLY CRIMINAL HISTORY “I” TO THE ADDITIONAL OFFENSES AND STATE THE INFORMATION IN PARAGRAPH 6 APPLICABLE TO THE ADDITIONAL OFFENSES.

8. IF REQUESTS FOR DEPARTURE HAVE BEEN FILED, EXPLAIN TO COUNSEL HOW YOU WILL HANDLE THE DEPARTURE HEARING.

- There is no prescribed proceeding for a departure hearing under K.S.A. 2011 Supp. 21-6817 [formerly K.S.A. 21-4718].
- A departure hearing may be conducted as a separate hearing, or the motion may be heard preceding other oral arguments and evidence on sentencing.
- If a separate departure hearing is held, the court may rule on the departure at the end of the hearing, “or within 21 days thereafter.” K.S.A. 2011 Supp. 21-6817(a)(2) [formerly K.S.A. 21-4718(a)(2)].

9. IF NO REQUESTS FOR DEPARTURE ARE ON FILE, ASK THE PARTIES WHETHER EITHER IS SEEKING A DEPARTURE.

This is not required by statute but it is the safest practice. In the event the PSI is not available in a timely manner, or other reasons arise which do not allow adequate time to prepare and present arguments regarding the issues of “departure sentencing,” a continuance must be granted. K.S.A. 2011 Supp. 21-6817(a)(1) [formerly K.S.A. 21-4718(a)(1)].

10. IF A DEPARTURE IS SOUGHT, CONDUCT A HEARING ON THE DEPARTURE MOTION(S). ALLOW COUNSEL TO ADDRESS THE COURT AND ALSO ALLOW THE WITNESSES FOR EITHER PARTY TO TESTIFY.

11. ASK EACH ATTORNEY FOR THE ATTORNEY’S SENTENCING SUGGESTIONS. THIS IS RELEVANT WHETHER OR NOT THE PARTIES HAVE AGREED TO RECOMMEND A PARTICULAR SENTENCE.

12. ASK IF ANY VICTIM(S) OR OTHERS WISH TO SPEAK CONCERNING THE SENTENCE(S) TO BE IMPOSED.

Following the rule in *State v. Parks*, 265 Kan. 644, 962 P.2d 486 (1998), non-victims and non-family members may also be permitted to submit written statements and/or speak.

13. ADDRESS THE DEFENDANT DIRECTLY (NOT HIS OR HER COUNSEL) AND CONDUCT ALLOCUTION UNDER K.S.A. 22-3422 AND K.S.A. 22-3424.

Ask the defendant personally if he or she wishes to make a statement or to present evidence in support of mitigation of sentence. Allow such statements or evidence.

14. ASK THE DEFENDANT WHETHER HE HAS ANY LEGAL CAUSE TO SHOW WHY SENTENCE SHOULD NOT BE PRONOUNCED.

15. ANNOUNCE THE GRANTING OR DENIAL OF ANY REQUESTED DEPARTURE, CITING THE SUBSTANTIAL AND COMPELLING REASONS FOR THE DEPARTURE IF GRANTED. IF A DEPARTURE IS DENIED THERE IS GENERALLY NO NEED TO STATE THE REASONS FOR THE DENIAL. HOWEVER, IN DENYING A JESSICA'S LAW DEPARTURE BACK TO A GUIDELINES SENTENCE, THE RECORD SHOULD BE CLEAR THAT THE JUDGE REVIEWED THE DEFENDANT'S ASSERTED MITIGATING CIRCUMSTANCES.

- Statutory mitigating and aggravating factors may be found at K.S.A. 2011 Supp. 21-6815 [formerly K.S.A. 21-4716] (nondrug) and K.S.A. 2011 Supp. 21-6816 [formerly K.S.A. 2010 Supp 21-4717] (drug).
- Sentencing courts must provide separate reasons based upon facts in the record, for any/every durational and dispositional departure. See *State v. Favela*, 259 Kan. 215, 911 P.2d 792 (1996).
- Reasons for departure must be “substantial and compelling.” See K.S.A. 2011 Supp. 21-6815(a), 21-6816(a) and 21-6818(c)(2) [formerly K.S.A. 21-4716(a), K.S.A. 2010 Supp. 21-4717(a) and 21-4719(c)(2)]. If the court is imposing a durational postrelease supervision departure under K.S.A. 2011 Supp. 22-3717(d), specifically state on the record the substantial and compelling reasons relied upon to impose a departure. See *State v. Anthony*, 273 Kan. 726 45 P.3d 852 (2002).
- Findings of fact as to the reasons for departure shall be made regardless of whether a hearing was requested. K.S.A. 2011 Supp. 21-6817(a)(4) [formerly K.S.A. 21-4718(a)(4)].
- For sex offenders, a post-release supervision period of up to 60 months may be ordered. K.S.A. 2011 Supp. 22-3717(d)(1)(D)(i). When imposing a durational postrelease supervision departure under K.S.A. 2011 Supp. 22-3717(d), state specifically on the record the substantial and compelling reasons to impose a departure. See *State v. Anthony*, 273 Kan. 726, 45 P.3d 852 (2002).

16. IF A SPECIAL RULE APPLIES, WHICH DOES NOT REQUIRE A DEPARTURE, STATE THE APPLICABLE RULE AND ITS EFFECT UPON THE SENTENCE IMPOSED. (See listing of special rules in the next following section)

17. ANNOUNCE THE SENTENCE FOR THE PRIMARY OFFENSE.

Suggestion: Follow the information layout for the offense in the PSI. Example: Mr. Doe, for the primary offense of theft, a level 9 nonperson felony, with your criminal history of B, I sentence you to the standard term of 14 months in the custody of the secretary of corrections. Your departure request for probation is granted. The court finds substantial and compelling reasons for the departure as follows: the two person felonies in your criminal history arose from the same incident, a bar fight, which occurred twenty years ago; you have no convictions since you served those sentences; the victim of the theft, your mother, is convinced you stole from her to buy oxycodone to self-medicate the pain from back problems and you need drug treatment, not prison; a drug treatment program is available to you in the community; and, the State has joined in the request for a departure to probation. You are granted probation to be supervised by Community Corrections for 12 months. If your probation is revoked, you will be remanded to DOC to serve the time left on your sentence, after credit for time served, but you can earn up to 20% maximum good time credit. Upon your release from prison you would then be on postrelease supervision for 12 months.

18. ANNOUNCE ALL OTHER SENTENCES, STATING WHETHER EACH ADDITIONAL SENTENCE IS CONCURRENT OR CONSECUTIVE TO THE PRIMARY OFFENSE SENTENCE.

The Court *must state on the record* if the sentence is concurrent or consecutive, otherwise it becomes a concurrent sentence by default except as provided by K.S.A. 2011 Supp. 21-6606(c), (d) and (3) [formerly K.S.A. 2010 Supp. 21-4608(c), (d) and (e)]. K.S.A. 2011 Supp. 21-6606(a) [formerly K.S.A. 2010 Supp. 21-4608(a)].

The total length of all consecutive sentences imposed cannot exceed twice the base sentence. The “**double rule**” and “**double-double rule**” are found at K.S.A. 2011 Supp. 21-6819 [formerly K.S.A. 21-4720]. The “**double-double rule**” applies to cap the total length of consecutive upward durational departure sentences. See *State v. Snow*, 282 Kan. 323, 342, 144 P.3d 729 (2006) and the subsequent *State v. Snow*, 40 Kan.App.2d 747, 195 P.3d 282 (2008).

19. ESTABLISH RESTITUTION AMOUNTS, IF ANY. SCHEDULE A RESTITUTION HEARING, IF THIS IS IN DISPUTE. ASSESS, OR DECLINE TO ASSESS, WITH PARTICULARITY, COSTS, FEES AND EXPENSES.

20. ESTABLISH THE NUMBER OF DAYS OF JAIL CREDIT TO WHICH THE DEFENDANT IS ENTITLED AND THE DEFENDANT’S “SENTENCE BEGINS DATE.”

See K.S.A. 2011 Supp. 21-6615 [formerly K.S.A. 21-4614 and K.S.A. 21-4614a].

21. ADVISE THE DEFENDANT THAT HE OR SHE MAY HAVE RIGHTS OF EXPUNGEMENT.

K.S.A. 2011 Supp. 21-6614 [formerly K.S.A. 2010 SUPP. 21-4619].

22. ADVISE THE DEFENDANT OF HIS OR HER RIGHT TO APPEAL BY FILING THE NOTICE WITHIN 14 DAYS, UNDER K.S.A. 22-3608, AND THE RIGHT TO COUNSEL.

Even if defendant’s jury trial counsel was retained, advise the defendant that he has the right to appeal his conviction and sentence, and, if he is indigent, counsel and the costs of the appeal will be afforded him. K.S.A. 22-3424(b). Likewise, when a defendant has been sentenced on a conviction resulting from a guilty or no contest plea, even if defendant’s plea counsel was retained, advise the defendant that, if he is indigent and wants to appeal the sentence, counsel and the costs of the appeal will be afforded him. *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982).

23. ADVISE THE DEFENDANT OF THE OBLIGATION TO REGISTER AS A SEX OFFENDER, IF APPLICABLE.

K.S.A. 22-4904 requires the sentencing court to inform the offender, on the record, of the procedure to register and the registration requirements of K.S.A. 22-4905. If an offender subject to registration receives a non-prison sanction the court must also see to the completion of the initial registration forms, confirm that the forms have been explained to the offender, require the offender to read and sign the forms, and order the offender to report within 3 days to the statutorily determined registering law enforcement agency.

24. ADVISE THE DEFENDANT OF THE PROHIBITIONS AGAINST A CONVICTED FELON POSSESSING A FIREARM, IF APPLICABLE.

See K.S.A. 2011 Supp. 21-6304(a)(1) through (a)(3) [formerly K.S.A. 2010 Supp. 21-4204(a)(2) through (a)(4)].

25. ADVISE THE OFFENDER OF THE LOSS OF CERTAIN CIVIL RIGHTS SUCH AS THE RIGHT TO VOTE UNTIL THE OFFENDER'S SENTENCE IS FULLY DISCHARGED.

See K.S.A. 2011 Supp. 21-6613 [formerly K.S.A. 21-4615]. Anyone convicted of a felony on or after July 1, 2002 may not vote until his or her sentence is completed. This specifically includes a sentence of probation.

26. IF IMPRISONMENT IS ORDERED, REMAND THE DEFENDANT TO THE CUSTODY OF THE SECRETARY OF CORRECTIONS OR THE SHERIFF, OR ESTABLISH A DATE TO REPORT IF A STAY OF EXECUTION IS GRANTED AND IF THE DEFENDANT IS NOT IN CUSTODY. ESTABLISH AN APPEAL BOND AMOUNT, IF REQUESTED. IF PROBATION IS GRANTED, DIRECT THE DEFENDANT AS TO WHEN AND TO WHAT SUPERVISING AGENCY HE IS TO REPORT.

LISTING OF SPECIAL SENTENCING RULES

1.	Person Felony Committed with a Firearm	- presumed prison. K.S.A. 2011 Supp. 21-6804(h) [formerly K.S.A. 2010 Supp. 21-4704(h)].
2.	Aggravated Battery of a LEO, committed prior to July 1, 2006, if criminal history is 6H or 6I	– presumed prison. K.S.A. 2011 Supp. 21-6804(g) [formerly K.S.A. 2010 Supp. 21-4704(g)].
3.	Aggravated Assault of a LEO, if criminal history is 6H or 6I	–presumed prison. K.S.A. 2011 Supp. 21-6804(g) [formerly K.S.A. 2010 Supp. 21-4704(g)].
34.	Battery on a LEO Resulting in Bodily Harm	- presumed prison and consecutive. K.S.A. 2011 Supp. 21-6804(r) [formerly K.S.A. 2010 Supp. 21-4704(q)].
32.	Drug Felony While in Possession of a Firearm	–presumed prison. Results in additional 6 months imprisonment. K.S.A. 2011 Supp. 21-6805(g) [formerly K.S.A. 2010 Supp. 21-4705(g)].
33.	Drug Felony with a Firearm that Discharges	– presumed prison. Results in additional 18 months imprisonment. K.S.A. 2011 Supp. 21-6805(g) [formerly K.S.A. 2010 Supp. 21-4705(g)].
4.	Felony Committed for the Benefit of a Criminal Street Gang	–presumed prison. K.S.A. 2011 Supp. 21-6804(k) [formerly K.S.A. 2010 Supp. 21-4704(k)].
11.	Extended Jurisdiction Juvenile Imposed	– both juvenile and adult K.S.A. 2011 Supp. 38-2364 sentences imposed, adult sentence stayed, conditioned on successful completion of juvenile sentence. K.S.A. 2010 Supp. 38-2347.
35.	Aggravated Endangering of a Child	– consecutive sentence required. K.S.A. 2011 Supp. 21-5601(c)(2) [formerly K.S.A. 2010 Supp. 21-3608a(b)].
36.	Ballistic Resistant Material – worn/used in commission, attempt, flight from felony	– presumed prison and consecutive. K.S.A. 2011 Supp. 21-6804(t) [formerly K.S.A. 2010 Supp. 21-4704(r)].
38.	Unlawful Sexual Relations	– presumed prison. K.S.A. 2011 Supp. 21-6804(s).
5.	Persistent Sex Offender	- if current conviction is presumed prison- double the maximum duration. K.S.A. 2011 Supp. 21-6804(j) [formerly K.S.A. 2010 Supp. 21-4704(j)].
12.	Second or Subsequent Manufacture of a Controlled Substance Conviction	– presumed prison, twice the maximum duration. K.S.A. 2011 Supp. 21-6805(e) [formerly K.S.A. 2010 Supp. 21-4705(e)].
26.	Third or Subsequent Felony Drug Possession occurring on or after July 1, 2008	- presumed prison. K.S.A. 2011 Supp. 21-5706 [formerly K.S.A. 2010 Supp. 21-36a06]. K.S.A. 2011 Supp. 21-6805(f) [formerly K.S.A. 2010 Supp. 21-4705(f)].
13.	Residential Burglary or Attempt or Conspiracy to commit such, with a Prior Residential, Non-Residential Building, Aggravated Burglary Conviction, or Conviction for Attempt or Conspiracy to commit such	– presumed prison. K.S.A. 2011 Supp. 21-6804(l) [formerly K.S.A. 2010 Supp. 21-4704(l)].

27.	Burglary with Two or More Prior Convictions for a Violation of Theft, Burglary, or Aggravated Burglary	– presumed prison. K.S.A. 2011 Supp. 21-6804(p) [formerly K.S.A. 2010 Supp. 21-4704(p)].
29.	Felony Theft with Three or More Prior Convictions for a Felony Violation of Theft, Burglary, or Aggravated Burglary	– presumed prison. K.S.A. 2011 Supp. 21-6804(p) [formerly K.S.A. 2010 Supp. 21-4704(p)].
*30.	Substance Abuse Underlying Factor, Treatment More Effective to Reduce Reoffense Risk <u>and</u> Community Safety Served	- KDOC Intensive Substance Abuse Treatment Program, Return to Court upon Successful Completion (For #27 or #29). K.S.A. 2011 Supp. 21-6804(p) [formerly K.S.A. 2010 Supp. 21-4704(p)].
*This option is included in statute, but is unavailable.		
31.	Third or Subsequent Criminal Deprivation of a Motor Vehicle	– presumed prison. K.S.A. 2011 Supp. 21-6804(n) [formerly K.S.A. 2010 Supp. 21-4704(n)].
16.	Second Forgery, if criminal history is I to C	– sentenced pursuant to sentencing requirements of K.S.A. 2011 Supp. 21-5823(b)(3) [formerly K.S.A. 21-3710(b)(3)], term of imprisonment not to be served in KDOC. (Criminal history A or B should be sentenced as a severity level 8 Nonperson Felony). K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].
17.	Third or Subsequent Forgery, if criminal history is I to C	– sentenced pursuant to sentencing requirements of K.S.A. 2011 Supp. 21-5823(b)(4) [formerly K.S.A. 21-3710(b)(4)], term of imprisonment not to be served in KDOC. (Criminal history A or B should be sentenced as a severity level 8 Nonperson Felony). K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].
9.	Crime Committed While Incarcerated and Serving a Felony sentence, or While on Probation, Parole, Conditional Release, or Postrelease Supervision for a Felony	– new sentence shall be imposed pursuant to consecutive sentencing provisions in K.S.A. 2011 Supp. 21-6606 [formerly K.S.A. 2010 Supp. 21-4608] and the court may impose prison even if presumption is nonprison. K.S.A. 2011 Supp. 21-6604(f)(1) [formerly K.S.A. 2010 Supp. 21-4603d(f)(1)].
28.	Crime Committed While Incarcerated in a Juvenile Correctional Facility for an Offense That Would Have Been a Felony if Committed by an Adult	– presumed prison. K.S.A. 2011 Supp. 21-6604(f)(2) [formerly K.S.A. 2010 Supp. 21-4603d(f)(2)].
10.	Crime Committed While on Felony Bond	– new sentence may be imposed pursuant to consecutive sentencing provisions in K.S.A. 2011 Supp. 21-6606 [formerly K.S.A. 2010 Supp. 21-4608] and the court may impose a prison sentence even if presumption is nonprison. K.S.A. 2011 Supp. 21-6604(f)(3) [formerly K.S.A. 2010 Supp. 21-4603d(f)(3)].

37.	Second or Subsequent Identity Theft or Identity Fraud	– presumed prison. K.S.A. 2011 Supp. 21-6804(u).
6.	Felony DUI, (third, fourth or subsequent conviction)	– nongrid, sentenced pursuant to specific mandatory sentencing requirements of K.S.A. 2011 Supp. 8-1567, term of imprisonment not to be served in KDOC. K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].
8.	Felony Domestic Battery	- nongrid, sentenced pursuant to specific mandatory sentencing requirements of K.S.A. 2010 Supp. 21-3412a(b)(3), prior to its repeal, or subsection (b)(3) of K.S.A. 2011 Supp. 21-5414, term of imprisonment not to be served in KDOC. K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].
21.	Animal Cruelty	- nongrid, K.S.A. 2010 Supp. 21-4310(a)(1) or K.S.A. 2010 Supp. 21-4310(a)(2)–(5), prior to their repeal, or K.S.A. 2011 Supp. 21-6412; Second or subsequent conviction; or Working/Assistance dogs - K.S.A. 21-4318(c), prior to its repeal, or K.S.A. 2011 Supp. 21-6416 - nongrid felony, sentenced pursuant to specific mandatory sentencing requirements of K.S.A. 2011 Supp. 21-6416(b) [formerly K.S.A. 21-4318(d)], term of imprisonment not to be served in KDOC. K.S.A. 2011 Supp. 21-6804(i) [formerly K.S.A. 2010 Supp. 21-4704(i)].
25.	Fraudulent Insurance Act - any combination of acts occurring within 6 consecutive months involving \$25,000 or more	– presumed prison. K.S.A. 2010 Supp. 40-2,118.
15.	Kansas Securities Act - violation resulting in a loss of \$25,000 or more	– presumed prison. K.S.A. 2011 Supp. 17-12a508(a)(5).
19.	Mortgage Business Act, second or subsequent conviction	– presumed prison. K.S.A. 2010 Supp. 9-2203(d).
20.	Loan Brokers Act, violation resulting in a loss of \$25,000 or more	– presumed prison. K.S.A. 50-1013(a).

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE PROSECUTION

EMPHASIS OF GUIDELINES IS ON CRIMINAL HISTORY AND CRIME SEVERITY

The KSGA places the emphasis of the sentencing phase of a criminal prosecution on the two factors that are generally of greatest concern to the prosecutor, the criminal history of the offender and the crime severity. The prosecution can focus its efforts on establishing by a preponderance of the evidence any challenged aspect(s) of the criminal history information provided in the presentence investigation report and presenting to the sentencing court any aggravating or mitigating circumstances which may provide substantial and compelling reasons for the court to consider imposing a departure sentence. Properly authenticated copies of journal entries of convictions or the mandatory presentence investigation reports prepared in conjunction with the prosecution of cases for crimes occurring on or after July 1, 1993, generally will be sufficient. Other properly authenticated documents that may be of use in proving criminal history include plea transcripts and charging documents such as an information, complaint, or indictment. The prosecution is entitled to reasonable time to obtain the necessary proof of prior convictions. K.S.A. 2011 Supp. 21-6814 [formerly K.S.A. 2010 Supp. 21-4715].

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, or K.S.A. 2011 Supp. 21-6814.

PLEA AGREEMENTS

The prosecution may enter into plea negotiations and agreements with the offender, although there are some limitations on the type of agreement that can be reached. An agreement by the prosecutor not to allege prior convictions that will enhance the crime severity level or will affect the criminal history of the offender is **impermissible**. However, the prosecutor may agree to a dismissal of some charges or counts in return for a plea by the offender to the charged offense or to a lesser or related charge. The prosecution may also agree to file or not to file a particular charge or count, to make a recommendation for a particular sentence within the appropriate sentencing range on the grid, or to make a recommendation for a departure sentence where substantial and compelling departure factors exist and are stated on the record. K.S.A. 2011 Supp. 21-6807 and 21-6812 [formerly K.S.A. 21-4707 and K.S.A. 2010 Supp. 21-4713] and K.S.A. 2010 Supp. 22-3210. The parties can agree to recommend a departure sentence, and, if the court approves the agreement on the record, the agreed sentence cannot be reviewed on appeal. K.S.A. 21-6820(c)(2) [formerly 21-4721(c)(1)].

DEPARTURE HEARINGS

The prosecution may file a motion alleging that substantial and compelling aggravating circumstances exist which call for a more severe sanction than the presumptively appropriate sentence provided by the guidelines. If the grid establishes a presumptive nonprison sentence for the crime of conviction, the prosecution may seek a dispositional departure in the form of a prison sentence. If the grid establishes a presumptive prison sentence within the range of time provided within the appropriate grid block, the prosecution may seek an upward durational departure in the form of a longer prison sentence. The prosecution is also free to seek a downward dispositional or durational departure based on the existence of substantial and compelling mitigating circumstances. The KSGA

contains non-exclusive lists of aggravating and mitigating circumstances on which motions for departures can be based. K.S.A. 2011 Supp. 21-6815 and 21-6816 [formerly K.S.A. 21-4716 and K.S.A. 2010 Supp. 21-4717].

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 2000 Supp. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2001 Supp. 21-4716 and K.S.A. 21-4718 subsequently were amended to correct the upward durational departure problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 2011 Supp. 21-6815 and 21-6817 [formerly K.S.A. 21-4716 and 21-4718].

Written and/or oral arguments may be presented to the sentencing court in support of any motion by the prosecution for a departure from the presumptive guidelines sentence or in response to any such motion by the offender when the matter of the proposed departure is set for hearing. The prosecution shall notify the victim(s) or their families of any departure hearings. See K.S.A. 2011 Supp. 21-6817, 21-6819 and 21-6818 [formerly K.S.A. 21-4718, and 21-4720, and K.S.A. 2010 Supp. 21-4719].

K.S.A. 2010 Supp. 21-4719(a) was amended during the 2009 Legislative Session to provide that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to no less than 50% of the center of the range of the sentence for such crime. K.S.A. 2011 Supp. 21-6818 [formerly K.S.A. 21-4719].

DEFINITE TERMS OF SENTENCE IMPOSED

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of specific duration, the prosecutor will be able to inform the victim(s) and their families about the amount of time the offender will serve in definite terms.

USING THE JOURNAL ENTRY OF JUDGMENT FORM TO ASSIST THE COURT IN MAKING A PROPER RECORD

The prosecution can also help the sentencing court to make a complete record of all phases of the sentencing proceedings, which are required by the guidelines through use of the Journal Entry of Judgment form approved by the Kansas Sentencing Commission. The use of the Journal Entry form is mandated by the KSGA and it provides guidance in conducting the sentencing process by including all essential information and findings on the record. See K.S.A. 2011 Supp. 22-3426. This form must be used for all felony cases sentenced on or after July 1, 1993. In addition, the court must forward a copy of the Journal Entry of Judgment, attached together with the presentence investigation report as provided by K.S.A. 2011 Supp. 21-6813 [formerly K.S.A. 2010 Supp. 21-4714], to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 2011 Supp. 22-3439.

All revocation of probation Journal Entries must be on a form approved by the Kansas Sentencing Commission (i.e., the Journal Entry of Probation Revocation Hearing) and must be sent to the Kansas Sentencing Commission within 30 days of final disposition. See K.S.A. 2011 Supp. 22-3439(b), and K.S.A. 2010 Supp. 22-3426a(c). Even if the probation revocation hearing does not result in the offender being imprisoned, a Journal Entry of Probation Revocation Hearing, on the approved form, must still be submitted to the Kansas Sentencing Commission. See K.S.A. 2011 Supp. 74-9101(b)(5).

Information for felony probation revocations, which do not result in imprisonment in the KDOC, must be forwarded to the Kansas Bureau of Investigation central repository within 30 days of final disposition. K.S.A. 2011 Supp. 22-3439(c).

APPEALS FROM DEPARTURE SENTENCES

K.S.A. 2011 Supp. 21-6820 [formerly K.S.A. 21-4721] provides for appeals from a departure sentence as follows, with emphasis added:

- (a) *A departure sentence is subject to appeal by the defendant or the state.* The appeal shall be to the appellate courts in accordance with rules adopted by the supreme court.
- (b) Pending review of the sentence, the sentencing court or the appellate court may order the defendant confined or placed on conditional release, including bond.
- (c) *On appeal from a judgment or conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:*
 - (1) *Any sentence that is within the presumptive sentence for the crime; or*
 - (2) *any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.*
- (d) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the sentencing grid for a crime, *sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure:*
 - (1) *Are supported by the evidence in the record; and*
 - (2) *constitute substantial and compelling reasons for departure.*
- (e) In any appeal, the appellate court may review a claim that:
 - (1) A sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression or corrupt motive;
 - (2) the sentencing court erred in either including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes; or
 - (3) the sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.
- (f) The appellate court may reverse or affirm the sentence. *If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing.*
- (g) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed. The court may issue a written opinion in any other case when it is believed that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the Kansas sentencing commission. The appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal.
- (h) A review under summary disposition shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required unless ordered by the appellate court and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.
- (i) The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors.

EXTENDED JURISDICTION JUVENILE CASES

Under K.S.A. 2011 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2011 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

PROVING THE AGE OF JESSICA’S LAW OFFENDERS

Imposition of an off-grid mandatory sentence of imprisonment under K.S.A. 21-6627 [formerly K.S.A. 21-4643] requires a factual finding that the offender was 18 years of age or older at the time of the offense. Unless the offender has stipulated to the offender’s age, that age is a fact question that must be submitted to a jury and proved beyond a reasonable doubt. *State v. Brown*, 291 Kan. 646, 244 P.3d 267 (2011). The Kansas Judicial Council has suggested that the jury’s factual finding on the offender’s age be included under a separate question on the verdict form. See the Notes on Use under the various PIK-Criminal elements instructions for offenses subject to Jessica’s Law enhancements.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR THE DEFENSE

IMPORTANCE OF ACCURATE, VERIFIED CRIMINAL HISTORY

Because the KSGA focuses so heavily on the criminal history of the offender as a determining factor of the sentence that will be imposed, the defense will be provided with a copy of the mandatory presentence investigation report, including the criminal history worksheet, and have an opportunity to challenge any errors contained in the report. Immediately upon receipt of the report the defense may file written notice to the prosecution and the sentencing court alleging errors in the proposed criminal history worksheet. The burden will then fall to the State to verify and establish by a preponderance of the evidence the accuracy of any disputed portions of the alleged criminal history, and the sentencing court is authorized to correct any errors. Consequently, the defense has an important role in ensuring that the sentence is based on an accurate criminal history that has been properly verified. See K.S.A. 2011 Supp. 21-6814 [formerly K.S.A. 2010 Supp. 21-4715].

In addition, because a sentencing court may take judicial notice of a prior criminal history worksheet as an accurate reflection of criminal history for use in a subsequent case, the offender may waive the right to challenge any errors contained in the worksheet by failing to do so when the worksheet is initially prepared and served on the parties. Failure to challenge any errors in the criminal history worksheet at a hearing on the proposed conversion of a sentence for a crime committed prior to July 1, 1993, to a KSGA sentence pursuant to the retroactivity provisions of the guidelines may also operate as a waiver of that opportunity in future cases. See K.S.A. 2011 Supp. 21-6813 [formerly K.S.A. 2010 Supp. 21-4714]. See also *State v. Turner*, 22 Kan. App. 2d 564, 919 P.2d 370 (1996) and *State v. Lakey*, 22 Kan. App. 2d 585, 920 P.2d 470 (1996).

The burden is on the prosecution when defendant objects to the criminal history classification. See *State v. Schow*, 287 Kan. 529, 197 P.3d 825 (2008). However, if criminal history has previously been established, the burden moves to the defendant, pursuant to 2009 legislation. See K.S.A. 2010 Supp. 21-4715(c), prior to its repeal, or K.S.A. 2011 Supp. 21-6814.

PLEA AGREEMENTS

Plea bargaining remains an available tool for use by defense counsel, subject to certain limitations. The KSGA **prohibits** the use of plea bargaining which involves a promise from the prosecutor not to allege prior convictions that may operate to enhance the crime severity level or are included in the offender's criminal history. However, the offender may enter a plea to the charged offense or to a lesser or related charge in return for the dismissal of other charges or counts. The offender may also obtain from the prosecution a promise to recommend a particular sentence within the appropriate sentencing range on the grid. In addition, the offender is free to secure a promise from the State to recommend a departure sentence favorable to the offender where mitigating departure factors exist. An agreement that a particular charge or count will or will not be filed, or any other promise not explicitly precluded by the KSGA, is permissible. However, the sentencing court will not be bound by any plea agreement proposed by the parties. K.S.A. 2011 Supp. 21-6807 and 21-6812 [formerly K.S.A. 21-4707 and K.S.A. 2010 Supp. 21-4713] and K.S.A. 2010 Supp. 22-3210.

CAN SEEK DISPOSITIONAL OR DURATIONAL DEPARTURE ON BEHALF OF OFFENDER

The offender may file a written motion alleging the existence of substantial and compelling mitigating circumstances that support the imposition of a less severe sanction than that provided by the KSGA for the crime of conviction. When the guidelines call for a prison sentence, the offender may move the sentencing court to impose a nonprison sentence as a dispositional departure. When the guidelines call for a prison sentence within the range of time provided by the appropriate grid block, the offender may move the sentencing court to impose a shorter prison sentence as a downward durational departure. See K.S.A. 2011 Supp. 21-6815, 21-6817, 21-6819, 21-6816 and 21-6818 [formerly K.S.A. 21-4716, 21-4718, 21-4720, and K.S.A. 2010 Supp. 21-4717, and 21-4719].

The offender may also be given the opportunity to offer written and/or oral arguments at the hearing on a motion for a departure favorable to the offender or in opposition to any unfavorable departures that may be proposed by the prosecution or the sentencing court on its own motion. K.S.A. 2011 Supp. 21-6817 [formerly K.S.A. 21-4718].

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), K.S.A. 21-4716 was found to be “unconstitutional on its face” for the imposition of upward durational departures. However, both K.S.A. 2002 Supp. 21-4716 and K.S.A. 2002 Supp. 21-4718 were amended to correct the upward durational departure problem arising from *Gould*. Effective June 6, 2002, the jury determines all aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. See K.S.A. 2011 Supp. 21-6815 and 21-6817 [formerly K.S.A. 21-4716 and 21-4718].

K.S.A. 2010 Supp. 21-4719(a) was amended during the 2009 Legislative Session to provide that no downward dispositional departure shall be imposed for any crime of extreme sexual violence; and further provides that the sentencing judge shall not impose a downward durational departure for a crime of extreme sexual violence to any less than 50% of the center of the range of the sentence for such crime. K.S.A. 2011 Supp. 21-6818 [formerly K.S.A. 21-4719].

CAN ADVISE THE OFFENDER ABOUT TIME TO BE SERVED IN DEFINITE TERMS

Because the terms of imprisonment, nonprison sentences, and postrelease supervision imposed by the sentencing court pursuant to the KSGA will be of definite duration, defense counsel will be able to advise the offender of the exact amount of time which the sentence will require the offender to serve once the criminal history is known.

APPEALS

The offender may appeal a sentence that constitutes a departure unfavorable to the offender. The imposition of a prison sentence where the guidelines provide a presumptive nonprison sentence is an appealable dispositional departure. The imposition of a prison sentence of greater duration than the guidelines presume is an appealable durational departure. A departure sentence is appealable on the grounds that substantial and compelling reasons justifying the departure are not supported by the record.

Appellate review of departure sentences imposed pursuant to the guidelines is otherwise limited to claims of partiality, prejudice, oppression, or corrupt motive, or claims challenging the crime severity ranking or the criminal history. See K.S.A. 2011 Supp. 21-6820 [formerly K.S.A. 21-4721].

EXTENDED JURISDICTION JUVENILE CASES

Under K.S.A. 2011 Supp. 38-2364(a), if an extended jurisdiction juvenile prosecution results in a guilty plea or finding of guilt, the court shall: (1) impose one or more juvenile sentences under K.S.A. 2011 Supp. 38-2361 and (2) impose an adult criminal sentence, the execution of which shall be stayed on the condition that the juvenile offender does not violate the provisions of the juvenile sentence and does not commit a new offense. *An adult felony Journal Entry of Judgment form must be completed for these cases.* A box is located in the “Special Rule Applicable” section of the adult Journal Entry of Judgment form labeled “Extended Jurisdiction Juvenile Imposed,” to indicate that the Journal Entry of Judgment is for a case where an extended jurisdiction juvenile sentence was imposed and should be checked in these cases.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR FIELD SERVICES OFFICERS

PREPARATION OF THE PRESENTENCE INVESTIGATION REPORT

Field services officers, including court services officers and community corrections officers, are responsible for preparing the Presentence Investigation Report (PSI). The PSI report is mandatory in all felony cases under the KSGA. The primary purpose of the PSI report is to provide complete and accurate information about the criminal history of the offender, because criminal history is one of the two primary determining factors of the appropriate sentence established by the guidelines for the crime(s) of conviction. Consequently, the Criminal History Worksheet is an essential component of the PSI report. The PSI report will contain a computation of the presumptive sentence provided by the guidelines for the crime(s) of conviction, based on the crime severity level provided by the guidelines and the criminal history of the offender. The PSI report will not contain socio-economic information about the offender and should not contain sentencing recommendations to the sentencing court.

The criminal history worksheet should indicate the officer's source of information for each prior conviction listed, and copies of any verifying documents available to the officer should be attached, including criminal history worksheets prepared in prior cases in which sentencing occurred after July 1, 1993, and in which the worksheet was prepared in accordance with the requirements of the KSGA.

The criminal history worksheet can be challenged for accuracy by the defense or the prosecution, and a hearing will then be held in which the prosecution has the burden of proving prior convictions through certified copies of journal entries or any other properly authenticated documents and proving by a preponderance of the evidence that any challenged component of the history is correct. See K.S.A. 2011 Supp. 21-6814 [formerly K.S.A. 2010 Supp. 21-4715]. The sentencing court has the duty and authority to correct any errors. A PSI report that has been prepared in accordance with the requirements of the KSGA after its effective date of July 1, 1993, can be the subject of judicial notice by a sentencing court in any subsequent felony proceeding. See K.S.A. 2011 Supp. 21-6814(f) [formerly K.S.A. 2010 Supp. 21-4714(f)].

NOTE: The following information is **not** relevant to establishing an offender's criminal history classification under the KSGA therefore; the following types of prior criminal activity **should not** be recorded on the Criminal History Worksheet.

- **Juveniles:** Do **not** include informal dispositions, traffic infractions, child in need of care adjudications, contacts with law enforcement, or arrests not resulting in adjudication.
- **Adults:** Do **not** include traffic infractions, diversions contacts with law enforcement, or arrests that do not result in conviction.

Prior convictions should be recorded in descending order by the date of conviction, starting with the most recent conviction.

The 2011 Presentence Investigation Report form contains a section on page 4 of the form to be used by field services officers to indicate which criteria of K.S.A. 2011 Supp. 75-5291(a)(2) is met by an offender who is being recommended for placement in a Community Corrections program. Please indicate for the sentencing court the specific criteria by which the offender may qualify for placement in Community Corrections.

SOME POINTS OF INTEREST ABOUT THE GUIDELINES FOR CLERKS OF THE COURTS

PROVIDING DOCUMENTATION OF PRIOR CONVICTIONS

Because of the importance of an accurate criminal history under the KSGA and the need to verify prior convictions that are counted in criminal history scoring, Clerks of the Courts may receive requests for certified copies of Journal Entries and other documents, including requests from other jurisdictions.

PRESENTENCE INVESTIGATION REPORT

The Presentence Investigation Report (PSI), *with the exception of the sections containing the official version, the defendant's version, victim comments, and psychological (including drug and alcohol) evaluations of the defendant*, will be public record and can be kept in the court file. K.S.A. 2011 Supp. 21-6813 [formerly K.S.A. 2010 Supp. 21-4714].

COPIES OF REQUIRED DOCUMENTS

A copy of the Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet of the Presentence Investigation Report, all on the mandated KSGA forms, must be attached together and forwarded to the Kansas Sentencing Commission within 30 days of sentencing. K.S.A. 2011 Supp. 21-6813(g) [formerly K.S.A. 2010 Supp. 21-4714(g)] and K.S.A. 2011 Supp. 22-3439(a).

A copy of the Journal Entry of Probation Revocation must be sent to the Kansas Sentencing Commission, along with a copy of the original Journal Entry of Judgment, the Presentence Investigation Report, and the Criminal History Worksheet with in 30 days of the final disposition. K.S.A. 2011 Supp. 22-3439(b).

EXTENDED JURISDICTION JUVENILE CASES

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